EDITOR'S NOTE

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No. 86-714-CFX
Status: GRANTED

Title: Rodney P. Westfall, et al., Petitioners
v.
William T. Erwin, Sr., and Emely Erwin

Docketed:
October 30, 1986

Court: United States Court of Appeals
for the Eleventh Circuit

See also:
86-833
86-862

Counsel for petitioner: Solicitor General

Counsel for respondent: Alspaugh, M. Clay

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Aug 18 1986 | | Application for extension of time to file petition and order granting same until September 30, 1986 (Powell, August 20, 1986). |
| 2 | Sep 19 1986 | | Application for further extension of time to file petition and order granting same until October 30, 1986 (Powell, September 22, 1986). |
| 3 | Oct 30 1986 | G | Petition for writ of certiorari filed. |
| 4 | Dec 10 1986 | | DISTRIBUTED. January 9, 1987 |
| 5 | Jan 6 1987 | F | Response requested. |
| 6 | Feb 7 1987 | | Brief of respondents William T. Erwin, Sr., et ux. in opposition filed. |
| 7 | Feb 11 1987 | | REDISTRIBUTED. February 27, 1987 |
| 8 | Feb 18 1987 | X | Reply brief of petitioners Rodney P. Westfall, et al. filed. |
| 10 | Feb 23 1987 | | REDISTRIBUTED. February 27, 1987 |
| 11 | Feb 23 1987 | | REDISTRIBUTED. February 27, 1987 |
| 12 | Mar 2 1987 | | Petition GRANTED. |
| | | | ********** |
| 13 | Apr 7 1987 | | Record filed. |
| 14 | Apr 7 1987 | | Certified copy of original record and proceedings, 2 volumes, received. |
| 15 | Apr 15 1987 | | Order extending time to file brief of petitioner on the merits until May 7, 1987. |
| 17 | May 4 1987 | | Order further extending time to file brief of petitioner on the merits until May 21, 1987. |
| 18 | May 21 1987 | | Order further extending time to file brief of petitioner on the merits until June 4, 1987. |
| 19 | Jun 4 1987 | | Brief of petitioners Rodney P. Westfall, et al. filed. |
| 20 | Jun 5 1987 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 21 | Jun 15 1987 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 23 | Jul 9 1987 | | Order extending time to file brief of respondent on the merits until August 28, 1987. |
| 24 | Aug 7 1987 | | Brief of respondents William T.Erwin, Sr., et ux. filed. |
| 25 | Aug 13 1987 | | CIRCULATED. |
| 26 | Aug 31 1987 | | SET FOR ARGUMENT. Monday, November 2, 1987. (3rd case). |
| 27 | Oct 23 1987 | X | Reply brief of petitioners Rodney P. Westfall, et al. filed. |
| 28 | Nov 2 1987 | | ARGUED. |

86-714



No.

# In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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36 pp

## QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Osburn Rutledge and William Bell were defendants in the district court and are petitioners in this Court.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No.

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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The Solicitor General, on behalf of Rodney P. Westfall, Osburn Rutledge, and William Bell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 785 F.2d 1551. The opinion of the district court (App., *infra*, 4a-7a) is unreported.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 8a-9a) was entered on April 8, 1986. A petition for rehearing was denied on June 2, 1986 (App., *infra*, 10a-11a). On August 20, 1986, Justice Powell issued an order extending the time for filing a petition for a writ of certiorari to and including September 30, 1986; on September 22, 1986, Justice Powell issued an order further extending the time within which to file a petition to and including October 30, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## STATEMENT

1. This is a state law tort action in which respondents seek monetary damages from petitioners, all of whom are federal employees, for injuries allegedly caused by conduct that was within the scope of petitioners' official duties. Respondent William T. Erwin, Sr., is employed by the federal government as a civilian warehouseman at the Anniston Army Depot in Anniston, Alabama. He asserts that he was injured on February 9, 1984, when he "picked up a bag of soda ash and inhaled some of the soda ash dust that had spilled from the bag" (Erwin Affidavit filed June 4, 1985, at 1). He claims that as a result of his contact with the soda ash he sustained chemical burns in his eyes and throat that caused permanent injury to his vocal chords and impairment of his ability to speak (*ibid.*; Complaint at 4).

William Erwin and his wife, respondent Emely Erwin, subsequently commenced this action in Alabama state court. The complaint alleged that "bags or containers of soda ash were improperly and negligently stored at [William Erwin's] workplace," that "such bags or containers were negligently designed or manufactured or alternatively, that the manufacturers or distributors of such bags issued inadequate warnings concerning their use and storage" (Complaint at 3). William Erwin stated in a subsequently filed affidavit that "[t]he soda ash that I inhaled was improperly stored and should not have been routed to the warehouse where I was working. Further, someone should have known that it was there and provided me with some warning as to its presence and danger before I inhaled it" (Erwin Affidavit at 1).

Petitioners, three federal employees who are supervisors at the Anniston Depot, are named as defendants in the complaint.[1] The complaint also lists as defendants 21 un-

[1] Petitioner Rodney P. Westfall is the chief of the Receiving Section at the Depot, Osburn Rutledge is the chief of the Breakdown and Bulk

named individuals or entities (Complaint at 1-3). William Erwin seeks damages in the amount of $500,000; Emely Erwin seeks $25,000 in damages for loss of consortium (*id.* at 4, 5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1); they filed a motion to dismiss or, in the alternative, for summary judgment on the ground that they were absolutely immune from suit. Respondents opposed the motion, asserting that a federal employee is entitled to immunity from tort liability only if the employee is engaged in policymaking activities. William Erwin filed an affidavit stating that petitioners "are not involved in any policy-making work for the United States Government. Their job duties are similar to mine, with the addition of their supervisory responsibilities. Therefore, [i]t is my understanding that their duties only require them to follow established procedures and guidelines. We all work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit at 2).

The district court granted the motion and dismissed the action against petitioners (App., *infra*, 4a-7a). The court first observed that petitioners' motion was accompanied by an affidavit stating that they were "acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of" respondents' tort claims; the court noted that respondents did not dispute those facts (*id.* at 5a). Relying upon *Johns* v. *Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985), the district court stated that "[t]he law of the Eleventh Circuit is clear that * * * any federal employee is entitled to absolute immunity for ordinary torts committed within the

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Delivery Unit, and William Bell is the chief of Unloading Unit No. 1 (Fomby Affidavit filed March 4, 1985, at 1).

scope of their jobs"; it held that petitioners accordingly were "absolutely immune from suit on account of the matters alleged in the complaint" (*id.* at 5a).

2. The court of appeals reversed (App., *infra*, 1a-3a). It observed that "the opinion [in *Johns* v. *Pettibone Corp.*, *supra*] relied on by the district court was subsequently withdrawn" (*id.* at 2a). The revised opinion "establishes the rule that 'a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty' " (*id.* at 3a, quoting *Johns* v. *Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) (emphasis in original; citation omitted)).

The court of appeals stated that the district court in the present case "erred as a matter of law in applying only one part of the immunity test—whether the act was in the scope of the employees' duties—without determining whether the challenged conduct was or was not discretionary" (App., *infra*, 3a). Finding that respondents had "alleged undisputed facts sufficient to create a material question of whether or not [petitioners'] complained-of acts were discretionary," the court reversed the grant of summary judgment and remanded the action for further proceedings (*ibid.*). Although the court of appeals did not define the term "discretion" in its decision in the present case, another panel of the Eleventh Circuit subsequently stated that " 'discretionary acts' involve planning or policy considerations and do not concern day to day operations" (*Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (citation omitted)).

## REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the extent to which federal employees are subject to personal liability for their official acts. The Court held in *Barr* v. *Matteo*, 360 U.S. 564 (1959), that a federal employee was absolutely immune from tort liability for damage allegedly

caused by conduct within the scope of his official duties. In recent years, the courts of appeals have developed a bewildering variety of standards to determine when a federal employee is protected from tort liability by the immunity principle recognized in *Barr*. One circuit has clearly adopted the view that all federal employees are immune from common law tort liability for their official acts, and many decisions from a number of appellate courts have used language consistent with that conclusion. Some circuits have restricted immunity to employees who exercise discretion, but they have defined that limitation in quite different ways. Thus, some courts classify only policymaking as discretionary, others include both policymaking and operational activities, and still others utilize a general inquiry under which the employee's entitlement to immunity depends upon the facts of each particular case.

In defining the scope of government employees' immunity from personal liability for constitutional violations, this Court has recognized that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated" (*Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). Here too, immunity can insulate federal employees from the threat of litigation, and thereby promote "the effective functioning of government" (*Barr*, 360 U.S. at 573), only if employees know in advance that they will not be subject to tort liability for their official acts. Under the present confused state of the law, however, federal employees cannot determine whether they will be protected from monetary liability in the event they are forced to defend their official actions in a state law tort suit. Since the differing approaches of the courts of appeals thus thwart the accomplishment of the very purpose that immunity is designed to promote, review by this Court is plainly warranted.[2]

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[2] The Court has recognized that the question presented in this case—the scope of federal officials' immunity from liability under

1. There is a sharp conflict among the courts of appeals with respect to the scope of federal employees' immunity from liability in state law tort actions. The Eighth Circuit recently concluded that every federal employee is absolutely immune from common law tort liability for his official acts, regardless of whether the employee exercises ministerial or discretionary authority. *Poolman* v. *Nelson*, No. 85-5401 (8th Cir. Sept. 30, 1986), slip op. 4-7.[3] The First Circuit has intimated an inclination to reach the same conclusion, observing that this Court "has not yet put its imprimatur upon a 'ministerial duty' exception to absolute immunity" (*Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985)).

Six courts of appeals have concluded that immunity from tort liability is available only to federal employees who perform "discretionary" activities; employees engaged in "ministerial" activities are not accorded any immunity. But these courts disagree among themselves with respect to the quantum of discretion that entitles an employee to immunity. The rule applied by the Third, Tenth, and Eleventh Circuits is that the federal employee must exercise policymaking authority. *Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (immunity is available only for "discretionary acts," which are those

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state tort law—is wholly separate from the scope of these officials' immunity from liability for constitutional violations. *Butz* v. *Economou*, 438 U.S. 478, 495 (1978). Thus, even though certain general principles are relevant in both contexts, the Court's decision in this case will not affect the standard for immunity from liability for constitutional violations established in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and its progeny.

[3] The court observed that "the discretionary or ministerial nature of an activity" may be relevant in determining whether an official's acts were within the scope of his authority, noting that "th[e] outer perimeter [of this authority] fluctuates in relation to the degree of discretionary authority afforded an official" (*Poolman*, slip op. 6).

acts that "involve planning or policy considerations and do not concern day to day operations"); *Araujo* v. *Welch*, 742 F.2d 802, 804 (3d Cir. 1984) (" 'immunity protects officers from liability only for actions having a policy-making or judgmental element' ") (citation omitted); *Jackson* v. *Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc) ("a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required").

The Fifth and District of Columbia Circuits follow a different immunity rule, applying an ad hoc functional analysis to determine whether the federal employee exercises sufficient discretion to warrant a grant of immunity. They "measure whether judicial scrutiny of a disputed official act might inhibit official policymaking and thus unduly interfere with the efficient operation of government." *Gray* v. *Bell*, 712 F.2d 490, 505-506 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); see also *Norton* v. *McShane*, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965). These two courts do not apply this standard in an identical manner. Compare, *e.g.*, *Dretar* v. *Smith*, 752 F.2d 1015 (5th Cir. 1985) (supervisor immune in tort action in which subordinate sought damages for alleged battery) with *McKinney* v. *Whitfield*, 736 F.2d 766 (D.C. Cir. 1984) (supervisor not entitled to immunity in similar situation).

The Sixth Circuit utilizes a broad definition of discretion, conferring immunity upon federal employees who exercise discretion at the operational level as well upon employees who formulate policy. *Granger* v. *Marek*, 583 F.2d 781 (6th Cir. 1978) (Internal Revenue Service agents); *Estate of Burks* v. *Ross*, 438 F.2d 230, 234 (6th Cir. 1971) (hospital administrator and doctor exercise discretionary authority and therefore are entitled to immunity; nurses

not immune because they perform ministerial functions). The First Circuit, which has assumed without deciding that an employee must exercise discretion in order to obtain immunity, also defines discretion in this manner. *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 464-465 (conduct of FBI agents in the course of an investigation).

The law is unsettled in the remaining courts of appeals. The Seventh Circuit has rejected the ministerial/discretionary distinction and stated that immunity might be limited to federal employees engaged in policymaking. *Lojuk* v. *Johnson*, 770 F.2d 619, 626-628 (7th Cir. 1985), cert. denied, No. 85-5782 (Jan. 13, 1986); but see *Carson* v. *Block*, 790 F.2d 562, 564 (7th Cir. 1986) (intimating that all federal employees are entitled to immunity); *Oyler* v. *National Guard Ass'n*, 743 F.2d 545, 552-553 (7th Cir. 1984) (rejecting argument that immunity extends only to policymakers).

Some panels of the Second, Fourth, and Ninth Circuits have indicated that a federal employee's entitlement to immunity turns upon whether the employee exercises discretion. See *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863, 870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *George* v. *Kay*, 632 F.2d 1103, 1105 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Green* v. *James*, 473 F.2d 660, 661 (9th Cir. 1973). However, more recent decisions of these courts have not reiterated the discretion requirement. See *Wyler* v. *United States*, 725 F.2d 156, 159 (2d Cir. 1983); *Sprecher* v. *Graber*, 716 F.2d 968, 975 (2d Cir. 1983); *Wallen* v. *Domm*, 700 F.2d 124, 125 (4th Cir. 1983); *Augustine* v. *McDonald*, 770 F.2d 1442, 1446 (9th Cir. 1985); *Miller* v. *DeLaune*, 602 F.2d 198, 200 (9th Cir. 1979). In any event, these courts' decisions indicate that if a showing of discretion is required, the applicable standard is the broad definition of discretion utilized by the First and Sixth Circuits. See, *e.g.*,

*Wyler* v. *United States, supra* (actions of Drug Enforcement Administration agents in performing their law enforcement responsibilities); *Wallen* v. *Domm, supra* (actions of supervisor); *Augustine* v. *McDonald, supra* (actions of government attorneys in garnishing the plaintiff's assets to satisfy judgments in favor of the United States).

The large number of recent appellate decisions addressing the question presented in this case is a reflection of the increasing frequency with which plaintiffs are utilizing actions under state tort law to challenge the official conduct of federal employees. A growing number of federal employees therefore face personal liability for their official acts, a circumstance that—together with the confusion about the proper scope of immunity—tends to inhibit the vigorous exercise of government authority, the very result that immunity is designed to prevent. Clarification by this Court of the standard governing official immunity from tort liability is necessary in order to eliminate this threat to the effective functioning of government.[4]

2. Moreover, the court of appeals' decision is incorrect. Petitioners are immune from tort liability in this case.[5]

a. This Court's first comprehensive discussion of the scope of federal employees' immunity from tort liability appears in its decision in *Spalding* v. *Vilas,* 161 U.S. 483 (1896). The plaintiff in that case sought money damages from the Postmaster General, asserting that the Postmaster General had issued a circular containing false

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[4] Three Members of the Court previously recognized the existence of differing approaches to the immunity issue. See *Martinez* v. *Shrock*, cert. denied, 430 U.S. 920 (1977) (White, J., joined by Brennan and Marshall, JJ., dissenting).

[5] The Court has made clear that a federal employee's entitlement to immunity from tort liability for his official acts is "judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress" (*Howard* v. *Lyons,* 360 U.S. 593, 597 (1959)).

statements in an effort to injure the plaintiff. This Court found that the Postmaster General's conduct was within the scope of his official duties and held that he was immune from liability even if he had acted with malice. The Court stated that (161 U.S. at 498-499)

> [i]n exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

The Court again addressed this immunity question in *Barr* v. *Matteo,* 360 U.S. 564 (1959). *Barr* was a libel action brought by former employees of the federal Office of Rent Stabilization against the acting director of that office. The plaintiffs alleged that they had been defamed by a press release issued by the acting director; this Court held that the acting director was immune from suit. A plurality of four Justices concluded that "the principle announced in *Vilas* can [not] properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts" (360 U.S. at 572 (footnote omitted)). It found that "[t]he privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government" (*id.* at 572-573), and concluded that the privilege was available to "officers of lower rank in the executive hierarchy" (*id.* at 573).

The plurality stated that it is "the duties with which the particular officer * * * is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,'—which must provide the guide in delineating the scope of the rule which clothes the official

acts of the executive officer with immunity from civil defamation suits" (360 U.S. at 573-574) (citation omitted)). It found that "[t]he fact that the action here taken [by the defendant] was within the outer perimeter of [his] line of duty is enough to render the privilege applicable" (*id.* at 575).[6]

*Barr* was the last decision in which this Court squarely addressed the scope of federal employees' immunity from non-constitutional tort liability.[7] The courts of appeals

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[6] Justice Black concurred in the result in *Barr*, emphasizing the importance of federal employees' freedom to communicate with the public (360 U.S. at 576-578). Justice Stewart agreed with the plurality's analysis of the standard governing the availability of immunity, but concluded that the defendant was not entitled to immunity because he was not acting within the scope of his official duties (*id.* at 592). Three Justices dissented because they disagreed with the plurality's conclusion regarding the scope of immunity (*id.* at 578-592).

[7] In *Doe* v. *McMillan*, 412 U.S. 306 (1973), the Court considered whether the Public Printer and the Superintendent of Documents were entitled to immunity in an action in which the plaintiffs sought damages for both constitutional violations and common law torts allegedly committed by these officials in connection with the production and distribution of a congressional committee's report. The Court concluded that these officials did not have "an independent immunity," but instead were immune from damages liability to the extent that employees of the government entity for which they performed printing services would have been entitled to immunity in connection with the production and distribution of the printed material; the officials' immunity in *Doe* therefore turned upon the scope of legislative immunity (412 U.S. at 323).

The Court in *Doe* did discuss *Barr* and at one point stated that "[j]udges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. But policemen and like officials apparently enjoy a more limited privilege" (412 U.S. at 319 (citations omitted)). However, the Court did not indicate whether this statement referred to immunity from constitutional claims or immunity from tort claims; indeed, it supported the reference to a "more limited privilege" by citing *Pierson* v.

uniformly have concluded that the immunity recognized in *Barr* is available to federal employees in connection with all types of state law tort claims, from negligence actions to actions seeking damages for intentional torts.[8] As we have discussed, the courts of appeals are sharply divided with respect to whether the privilege protects all federal employees as long as they do not exceed the bounds of their governmental authority, or only protects employees in the performance of particular sorts of functions. In our view, federal employees are protected from personal financial liability under state tort law as long as they act within the scope of their official duties. Moreover, even if all federal employees are not protected by immunity, employees who exercise operational discretion—such as the discretion exercised by petitioners in their capacities as supervisors—should be protected by immunity.[9]

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*Ray*, 386 U.S. 547 (1967), a case that addressed a police officer's immunity from liability for violations of the Constitution. In view of this ambiguity, and the fact that limiting the scope of immunity under *Barr* was not necessary—or even relevant—to the ground of decision in *Doe*, the Court's brief reference to the scope of immunity cannot be viewed as announcing a restriction upon official immunity in the common law tort context.

[8] See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982) (characterizing *Vilas* and *Barr* as according "absolute immunity from suits at common law"); *Norton* v. *McShane*, 332 F.2d at 859-860 & n.5.

[9] Although the standard for which we contend is a rule of absolute immunity, it operates in the context of non-constitutional torts in a manner similar to the qualified immunity standard adopted in *Harlow* v. *Fitzgerald*, *supra*, for constitutional wrongs. In both situations, the immunity rule is designed to protect a federal official from personal liability when his conduct remains within the scope of his governmental authority.

A qualified immunity rule in the absence of a constitutional claim presumably would turn upon the defendant's subjective good faith (see *Barr* v. *Matteo*, 360 U.S. at 586-588 (Brennan, J., dissenting)), but the Court rejected such an approach in *Harlow* on the ground that an immunity standard that depends upon the official's actual state of mind "may entail broad-ranging discovery and the deposing of

b. Although *Barr* itself involved "an official of policy-making rank" (360 U.S. at 575), the plurality in *Barr* plainly did not restrict immunity to federal employees who exercise a particular quantum of discretion.[10] The plurality's only discussion of the fact that the defendant in *Barr* did exercise discretion was in connection with its determination that the challenged conduct was "within the outer perimeter of [his] line of duty" (*ibid.*). Indeed, the plurality took pains to point out that the discretionary nature of the defendant's responsibilities did not *divest* him of the protection of immunity (*ibid.* (emphasis in original; footnote omitted)):

> That [the defendant] was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

*Barr* thus did not restrict immunity to employees who exercise discretion. Accord *Poolman* v. *Nelson*, slip op. 4-7; *Lojuk* v. *Johnson*, 770 F.2d at 626-627; *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 463-464.[11]

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numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." (457 U.S. at 817 (footnotes omitted)).

[10] The plurality's legal analysis of the scope of immunity is particularly significant because it was adopted by Justice Stewart (360 U.S. at 592) and therefore represented the views of five Members of the Court.

[11] Some courts have seized upon the statement in *Barr* that "the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions" (360 U.S. at 573). But

Further, the policies underlying the decision in *Barr* support a rule immunizing all federal employees from common law tort liability for acts within the scope of their official duties. The *Barr* plurality stated that immunity is designed "to aid in the effective functioning of government" (360 U.S. at 573). Thus, "[i]t has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 571; see also *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand. J.), cert. denied, 339 U.S. 949 (1950).[12]

Any federal employee, regardless of his duties, undoubtedly will be affected by the prospect of litigation and personal liability for harms that allegedly result from the performance of his job. Forcing employees to bear these risks must itself have a price, which will necessarily be reflected in either higher wages and salaries for government workers or a reduction in the quality of the federal

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the plurality simply was referring to the fact that the greater the official's authority, the "broader the range of [his] responsibilities and duties," and, therefore, the wider the outer perimeter of his line of duty (*ibid.*). The statement in no way indicates that lower level officials are not protected by immunity.

[12] The rule of immunity adopted in *Barr* also protects against "state interference" with federal officials' execution of their duties under federal law. *Butz* v. *Economou*, 438 U.S. 478, 495 (1978); *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 463; cf. *In re Neagle*, 135 U.S. 1, 61-63 (1890).

workforce.[13] And few if any jobs are so purely ministerial in nature as to leave no room for the shading of decisions and the hedging of conduct to take account of the risk of personal liability.[14] Even if an employee's duties are solely ministerial, moreover, the federal government may bear the loss of productivity due to the time that the employee was required to devote to defending the lawsuit.

These consequences will disrupt the effective functioning of the government whether or not the employee's duties involve the exercise of a particular quantum of discretion. The *Barr* plurality observed that "[t]he complexities and magnitude of government have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" (360 U.S. at 573 (footnote omitted)). Indeed, a rule restricting immunity to policymakers or some other group of high-level officials

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[13] As one court of appeals recently observed (*Carson* v. *Block*, 790 F.2d at 564),

> [p]rivate firms may buy insurance for their employees, or give them bonuses or shares of the enterprise to induce them to take risks. The United States does not offer [government officials] a "share of the profits" from federal programs * * * and a system under which officials face risks of substantial liability for error without any corresponding prospect of reward for good work is doomed. Only the addled and the foolhardy would disregard these incentives, and the addled and foolhardy do not execute statutes very well.

[14] A ministerial duty is a mandatory duty expressly imposed by and specifically delineated in a statute, regulation, or other directive. See *Davis* v. *Scherer*, 468 U.S. at 197 n.14 ("[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority").

would encourage tort plaintiffs seeking monetary damages to focus their efforts upon the vast majority of lower ranking federal employees who are responsible for carrying out the routine day-to-day functions of government. These lower level employees are the individuals least able to shoulder personal monetary liability and, accordingly, the federal employees whose official actions are most likely to be inhibited by the threat of liability.

Perhaps most importantly, restricting immunity to federal employees who exercise discretionary authority undercuts the very purpose that immunity is designed to serve by creating great uncertainty about when and to whom it applies. The fact that an employee ultimately may be found to be entitled to immunity is irrelevant if the employee cannot determine in advance that he will receive that protection. *Davis* v. *Scherer*, 468 U.S. at 195. A rule limiting immunity to acts involving a particular quantum of discretion is simply too vague and uncertain to satisfy this requirement.

This Court has observed in other contexts that a distinction cannot easily be drawn between discretionary and ministerial functions. See *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984); *Owen* v. *City of Independence*, 445 U.S. 622, 648 n.31 (1980) (observing with respect to the immunity rule protecting a municipality from tort liability for discretionary acts that "a clear line between the municipality's 'discretionary' and 'ministerial' functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act"). Indeed, one court of appeals candidly has observed that "[a]lmost any wrong can be characterized as discretionary or non-discretionary for purposes of exception from liability under either the FTCA or the common law" (*Sami* v. *United States*, 617 F.2d 755, 771 (D.C. Cir. 1979)). An

immunity rule that turns upon whether an employee exercises discretion would make it difficult for the employee to ascertain in advance whether his conduct was protected by immunity and, therefore, would force the employee to act as if he had no immunity at all. The discretion requirement would thus eviscerate the benefits to the government that the immunity rule is designed to provide. Cf. *Coleman* v. *Frantz*, 754 F.2d 719, 727-728 (7th Cir. 1985).[15]

The rule for which we contend may prevent some plaintiffs from obtaining compensation for their injuries, although the limited financial resources of most federal employees engaged in non-discretionary duties suggest that few plaintiffs lose any genuine opportunity for compensation under a rule of absolute immunity for common law torts. See *Sami* v. *United States*, 617 F.2d at 772.[16] The conclusion of the plurality in *Barr* regarding this point is equally applicable here: "as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a

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[15] A further practical difficulty with a discretion requirement is that discovery may be necessary to determine whether the defendant exercises sufficient discretion to qualify for immunity. See, *e.g.*, *Heathcoat* v. *Potts*, 790 F.2d at 1543 ("detailed but abstract" job descriptions not sufficient; court remanded the case for "a fuller development of the facts" through discovery). When discovery is required to sustain a claim to immunity, it is no longer "an *immunity from suit* rather than a mere defense to liability" (*Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 14 (emphasis in original)). In this case, for example, the court of appeals remanded for further proceedings regarding the immunity issue (App., *infra*, 3a).

[16] Of course, immunity would not necessarily leave the plaintiff without a remedy; compensation may be available from the United States under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, or the Federal Tort Claims Act, 28 U.S.C. 1346(b). And federal employees' immunity would, of course, be limited to acts within the scope of their official duties.

necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576).[17]

c. Even if the Court disagrees with our submission that immunity should be extended to all federal employees acting within the scope of their duties, and concludes that only employees with discretionary authority are protected by immunity, petitioners exercise sufficient discretion to be entitled to immunity in this case. The basis of respondents' tort claim is that petitioners negligently stored, designed, manufactured, or labeled the soda ash

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[17] This rule of absolute immunity is particularly appropriate, and should at a minimum be recognized, in situations such as the present case where both the plaintiff and the defendant are federal employees and the lawsuit relates to the defendant's execution of his official duties in the employees' common workplace. Suits between employees are especially likely to affect adversely the functioning of the government because they tend to preclude the cooperation among federal employees that is necessary to the successful execution of the employees' official duties. Such actions also may become vehicles for personal vendettas rather than legitimate efforts to obtain compensation for damage incurred by the plaintiff.

Further, Congress expressly established a remedial system for injuries incurred by federal employees in the course of their duties when it enacted the Federal Employees' Compensation Act (FECA). The Act provides for administrative, no-fault compensation for certain injuries incurred by federal employees in the course of their duties. See 5 U.S.C. 8101-8151. The presence of this alternative remedy for many of the injuries that form the basis of co-employee tort actions weighs in favor of the recognition of immunity in this context. (We have been informed by the Department of the Army that William Erwin was reimbursed under the FECA for his medical costs and received disability pay for the period that he was unable to work. He did not receive compensation for the alleged permanent harm to his vocal chords on the ground that the FECA does not authorize compensation for that injury.)

containers. Where and how to store the soda ash and whether warnings should have been given to persons handling the soda ash containers all are questions involving the exercise of discretion in the operation of the Depot warehouse.[18] Since petitioners—if they in fact were responsible for these decisions—were required to exercise discretion, their decisions with respect to these issues must be insulated from the threat of liability.

Respondents' allegations are quite similar to the allegations of the plaintiffs in *Dalehite* v. *United States*, 346 U.S. 15 (1953), that the United States was liable for negligently manufacturing, storing, and labeling a fertilizer that had explosive properties. This Court concluded in that case that recovery was barred by the discretionary function exception to liability under the Federal Tort Claims Act (see 346 U.S. at 38-44). It specifically observed that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [the discretionary function exception] would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion" (*id.* at 36 (footnote omitted)). Petitioners—individual federal officials charged with negligently carrying out similar policies—should be protected from tort liability under the same rationale. Whether petitioners made the relevant discretionary decisions or simply carried out

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[18] In the course of overseeing the operation of the warehouse, petitioners must issue literally hundreds of instructions on a daily basis to the employees of that facility. Petitioners' performance as supervisors plainly would be chilled, and the overall operation of the facility thereby adversely affected, if they were threatened with personal liability in connection with each and every one of these instructions.

discretionary decisions made by others, they should not be subject to personal liability for damage resulting from those actions.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RICHARD K. WILLARD
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OCTOBER 1986

**APPENDIX A**

# UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL., DEFENDANTS-APPELLEES.

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Appeal from the United States District Court for the Northern District of Alabama.

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[Filed Apr. 8, 1986]

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Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

PER CURIAM:

This case presents an appeal from the district court's grant of summary judgment on immunity grounds to defendants in a tort suit by a federal employee against co-employees and supervisors. Since summary judgment was granted on the basis of law that has recently changed in this Circuit, we REVERSE and REMAND for reconsideration.

Plaintiff-appellant William T. Erwin, Sr., a warehouseman at the Anniston Army Depot in Anniston, Alabama, was injured on February 9, 1984, by workplace exposure to toxic soda ash. Some of the ash, which was stored in appellant's warehouse, had spilled from its con-

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

tainers. Erwin inhaled a quantity of the ash, allegedly suffering chemical burns to his eyes and throat, permanent injury to his vocal cords, and emotional and mental distress. His co-plaintiff and wife, Emely Erwin, suffered a loss of his consortium.

Charging that his injuries were proximately caused by the negligence of certain co-employees and supervisors, Erwin brought suit in Jefferson County Circuit Court on February 7, 1985. The action was removed to the United States District Court for the Northern District of Alabama on March 25, 1985. That court granted summary judgment to defendants-appellees on June 5, 1985, on the ground that the latter were immune from suit as a matter of law since they were federal employees acting within the scope of their duties when the complained-of negligence occurred.

The district court based its ruling on *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir.1985) (per curiam). *Pettibone* held that " 'absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs.' " *Id.* at 1486 (citations omitted).

Conclusions of law rendered by means of a summary judgment are subject to the same standard of appellate review as any other question of law raised on appeal. *Morrison v. Washington County, Ala.*, 700 F.2d 678, 682 (11th Cir.1983). At the time summary judgment was granted, the district court was correct in ruling as it did under *Pettibone*. However, the opinion relied on by the district court was subsequently withdrawn. A revised opinion appeared at *Johns v. Pettibone*, 769 F.2d 724 (11th Cir.1985) (*Pettibone II*). And portions of that opinion in turn were recently deleted on rehearing in *Johns v. Pettibone*, No. 84-7361, slip op. (11th Cir. Nov. 12, 1985) (per curiam) (*Pettibone III*). By the latter order, this Court also denied a petition for rehearing *en banc*.

*Pettibone III* establishes the rule that "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty." *Pettibone III*, slip op. at 527 [769 F.2d at 728]. Thus, in granting summary judgment the district court erred as a matter of law in applying only one part of the immunity test—whether the act was in the scope of the employees' duties—without determining whether the challenged conduct was or was not discretionary.

Appellants' efforts to persuade us to abandon the *Pettibone III* rule are unavailing. It is the law of this Circuit. Plaintiffs have alleged undisputed facts sufficient to create a material question of whether or not defendants' complained-of acts were discretionary. Summary judgment was thus inappropriate.

Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

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CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE; WILLIAM BELL; ET AL.; DEFENDANTS.

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[Filed June 5, 1985]

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**MEMORANDUM OF DECISION**

Plaintiffs commenced this action in state court against the three named defendants and a variety of fictitious defendants seeking to recover for injuries allegedly inflicted upon plaintiff William T. Erwin, Sr. at his work place while an employee of the United States Government at the Anniston Army Depot. The three named defendants are alleged to be co-employees and/or supervisors. Defendant Westfall timely removed the entire action to this court and all three defendants have now filed a motion to dismiss, or in the alternative for summary judgment. Plaintiffs have filed an objection to the removal and to the dismissal, which objection the court treats as a motion to remand to the state court.

The motions came on for hearing at a scheduled motion docket held May 10, 1985. At the conclusion of the hearing counsel for plaintiffs requested the opportunity to submit a brief on the issues embodied in the motions. The

court gave counsel two weeks, which period at the request of counsel was twice extended, with the final deadline for briefs being June 3, 1985. The motions are now ripe for a decision thereon.

The motion for summary judgment is supported by affidavit and points out that the three named defendants were employees of the United States acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of the ordinary tort claims which are stated in the complaint. The affidavit of plaintiff William T. Erwin does not traverse the fact that the alleged tort was committed within the scope of defendants' jobs. Indeed, the Erwin affidavit almost admits that the acts or omissions of defendants took place at the work site of defendants and within the scope of their jobs. These three defendants are therefore absolutely immune from suit on account of the matters alleged in the complaint and the motion for summary judgment as to them will be granted by separate order. *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985). Plaintiffs seek to avoid the effect of the holding in *Pettibone* by observing that *Pettibone* does not discuss discretionary, non-discretionary and ministerial functions. No such discussion was necessary. The law of the Eleventh Circuit is clear that absent an allegation of a tort of constitutional magnitude, any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs. *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978).

Plaintiffs included in the complaint a variety of fictitious defendants and as to them the court will remand this action to the state court. The remand will be without prejudice to any defendant substituted for a fictitious defendant hereafter served removing the action to this court. In this regard, the court notes that it is entirely likely that any defendant substituted for fictitious defendants

No. 1 and No. 2 (and possibly other fictitious defendants) will also be immune as employees of the government acting within the scope or [*sic*] their official duties.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

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CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE; WILLIAM BELL; ET AL.; DEFENDANTS.

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[Filed June 5, 1985]

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**ORDER**

In accordance with the Memorandum of Decision this day entered, it is

ORDERED, ADJUDGED and DECREED that the motion of defendants Rodney P. Westfall, Osborn Rutledge and William Bell for summary judgment in their favor is GRANTED and they are DISMISSED as defendants, with prejudice.

The claims of plaintiffs against all fictitious defendants are REMANDED to the Circuit Court of Jefferson County, Alabama, from whence they were removed. The clerk of court is directed to send a copy of this order to the clerk of such state court.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 85-7437
D.C. Docket No. 85-0874

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL, OSBORN RUTLEDGE,
WILLIAM BELL, ET AL., DEFENDANTS-APPELLEES.

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Appeal from the United States District Court for the Northern District of Alabama

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Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 8, 1986
For the Court:
Spencer D. Mercer, Clerk

By: /s/ AARON A. GODFREY
*Deputy Clerk*

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS-APPELLEES.

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Appeal from the United States District Court for
the Northern District of Alabama

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[Filed June 2, 1986]

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*ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC* (Opinion APRIL 8, 1986, 11 Cir., 198__, ____ F.2d ____). (JUNE 2, 1986)

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, U.S. District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/FRANK M. JOHNSON JR.
United States Circuit Judge

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40043

# OPPOSITION

# BRIEF

No. 86-714 (2)

IN THE

# Supreme Court Of The United States

October Term, 1986

RODNEY P. WESTFALL, ET AL.
*Petitioners*

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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22 pp

## QUESTIONS PRESENTED

1. Whether a conflict exists among the Circuit Courts of Appeal regarding application of the official immunity doctrine in a common law negligence case that justifies review by this Court.

2. Whether the Eleventh Circuit Court of Appeals, under the facts in this case correctly denied Petitioners' claim of official immunity.

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No. 86-714

IN THE

# Supreme Court Of The United States

October Term, 1986

RODNEY P. WESTFALL, ET AL.
*Petitioners*

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

R. Ben Hogan, III, and M. Clay Alspaugh, on behalf of Respondents William T. Erwin, Sr., and Emely Erwin, oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the case.

## STATEMENT OF THE CASE

Respondents are satisfied with Petitioners Statement of the Case.

## REASONS FOR DENYING THE WRIT

**1. There does not exist among the Circuit Courts of Appeal conflicts regarding application of the official immunity doctrine in a common law negligence action that justifies review by this Court.**

Though Petitioners have alleged that there is a conflict among the circuit courts of appeal that justify review by this Court, such is not the case. Though the various courts of appeals do, as argued by Petitioners, render different opinions concerning the application of the law, each is distinguishable on its facts and were correct applications of this Court's previous ruling in *Barr v. Matteo,* 360 U.S. 564 (1959). In *Poolman v. Nelson,* 802 F.2d 304 (8th Cir. 1986) cited by Petitioners at page 6, a misrepresentation case based upon communications between a county supervisor for the Farmers Home Administration (FmHA) and the plaintiff who applied for a loan with the Farmers Home Administration, the FmHA employee who allegedly made the representation was an official of policy making rank exercising that particular authority. The issue presented to the Eleventh Circuit in this case was not the issue upon which *Poolman* turned. Here the Petitioners are all of a status that do not involve policy making in order to govern, contrary to the Farmers Home Administration's employee in *Poolman.* In fact, in distinguishing the Eighth Circuit's opinion from the Eleventh, the court did not have to consider the question of immunity for a non-policy making official. Therefore, the Eighth Circuit in fact, has not spoken to the issues addressed by the Eleventh Circuit.

As has been pointed out by Petitioner, six Courts of Appeals, the Third, Fifth, Sixth, Tenth, Eleventh, and District of Columbia, hold that immunity from tort liability is available only to federal employees who perform "discretionary" activities; employees involved in ministerial or operational activities are not accorded any immunity. Petitioners have stated in brief that those Courts disagree among themselves with respect to the quantum of discretion that entitles an employee to immunity.

Assuming, arguendo, that the "quantum of discretion" is the issue, the general principle of immunity as challenged here is not effected. Since each case would have to necessarily be judged independently, i.e., the particular activities involved and whether or not that activity has any effect on governing, then there can be no iron-clad rule for application so as to justify involvement by this Court. As was stated by this Court in *Doe v. McMillan,* 412 U.S. 306 (1973) and interpreting *Barr, supra.,* the immunity conferred is not a "fixed, invariable rule of immunity," id. at 320, and that each case requires "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh[s] the perhaps recurring harm to individual citizens" id. Only if the activity of the officials is such that lack of immunity would inhibit the fearless, vigorous, and effective administration of *policies* of government, should the immunity attach. *Barr,* 360 U.S. at 571. Thus, only if the policies of governing are effected, should official immunity apply.

As has been pointed out in brief by Petitioners, all of the Circuits have held, in interpreting *Barr,* and *Doe, supra.,* that immunity is limited in scope and only available should the function be involved with governing. Though Petitioners state that there is an increased frequency which plaintiffs are utilizing actions under the state tort law to challenge *official conduct of a federal employee* such is not the question. The conduct that is challenged is not official conduct, but conduct from which a duty or obligation grows toward the injured plaintiff and whether or not the actions that accompany that duty are those that tend to affect the job of governing or policy making. As was pointed out in *Martinez v. Shrock,* cert. denied, 430 U.S. 920 (1977), three justices of this Court reiterated the holding in *Barr* as follows:

> [T]his Court has recognized a very narrow category of judicially created absolute immunity for some federal officials. See, *Barr v. Matteo, supra.* However, such absolute immunity heretofore has only been applied to policy making officials; and nowhere has it been suggested that there

> is a judicially created unqualified immunity for government functionaries operating at respondent's level.[1]

The Petitioners recognized that there is no split of opinions among the Circuits, since there could be none, that all federal employees are not protected by immunity, and thus prays that this Court grant the Petition, extending in all cases, immunity to those who exercise "operational discretion". In analyzing the cases dealing with this, as has been more completely cited by Petitioners, invariably the courts of appeals have recognized the limitation of immunity in "operationally discretionary functions." As was stated by the Eleventh Circuit in *Johns v. Pettibone,* 769 F.2d 724, 727 (11th Cir. 1985):

> We have recently noted, however, that not every act which might literally be termed "discretionary" is sufficient to invoke the immunity doctrine. Indeed, "[I]n the strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion."

As such, there is no, and should be no overriding consideration so as to grant to all employees involved in operations of government immunity from their common law torts.

## 2. The Eleventh Circuit correctly decided the issue of official immunity in this case.

As was pointed out by the Eleventh Circuit Court of Appeals (App. A-3) the two-prong test to apply in order to determine whether or not immunity attaches includes a determination as to whether or not the challenged conduct is a discretionary act and *is within the outer perimeter of the actor's line of duty.* As the court appropriately stated, contrary to the argument of Petitioners herein, on motion for summary judgment there were undisputed allegations of fact by the plaintiffs (Respon-

[1]In *Martinez,* Certiorari was denied to review the decision of the Third Circuit granting official immunity to two army surgeons for their acts of medical negligence holding that the policy of government to attract qualified physicians to government service would be inhibited if plaintiff's claim for medical negligence was allowed.

dents) which created a material question as to whether or not the activities of the government employees were "discretionary". The activities of the defendants herein, were activities involving day-to-day operation, not involving planning or policy consideration. As the Eleventh Circuit has held in other tort actions,[2] there were questions of fact presented at least establishing issues that the functions of these defendants were not such a discretionary function so as to, as a matter of law, entitle them to immunity.

## CONCLUSION

For the foregoing reasons, Respondents would respectfully submit that the Petition for Writ of Certiorari be denied.

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Counsel of Record

M. Clay Alspaugh
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[2]*Heathcoat v. Potts,* 790 F.2d 1540 (11th Cir. 1986); *Hendrix v. Patterson,* 779 F.2d 1056 (11th Cir.), (order without opinion); *Re-Hearing En Banc,* denied, 779 F.2d 60 (1985); *Johns v. Pettibone,* 769 F.2d 724 (11th Cir. 1985).

# APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the
Northern District of Alabama.

[Filed Apr. 8, 1986]

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

PER CURIAM:

This case presents an appeal from the district court's grant of summary judgment on immunity grounds to defendants in a tort suit by a federal employee against co-employees and supervisors. Since summary judgment was granted on the basis of law that has recently changed in this Circuit, we REVERSE and REMAND for reconsideration.

Plaintiff-appellant William T. Erwin, Sr., a warehouseman at the Anniston Army Depot in Anniston, Alabama, was injured on February 9, 1984, by workplace exposure to toxic soda ash. Some of the ash, which was stored in appellant's warehouse, had spilled from its containers. Erwin inhaled a quan-

*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

tity of the ash, allegedly suffering chemical burns to his eyes and throat, permanent injury to his vocal cords, and emotional and mental distress. His co-plaintiff and wife, Emely Erwin, suffered a loss of his consortium.

Charging that his injuries were proximately caused by the negligence of certain co-employees and supervisors, Erwin brought suit in Jefferson County Circuit Court on February 7, 1985. The action was removed to the United States District Court for the Northern District of Alabama on March 25, 1985. That court granted summary judgment to defendants-appellees on June 5, 1985, on the ground that the latter were immune from suit as a matter of law since they were federal employees acting within the scope of their duties when the complained-of negligence occurred.

The district court based its ruling on *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir.1985) (per curiam). *Pettibone* held that " 'absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs.' " *Id.* at 1486 (citations omitted).

Conclusions of law rendered by means of a summary judgment are subject to the same standard of appellate review as any other question of law raised on appeal. *Morrison v. Washington County, Ala.*, 700 F.2d 678, 682 (11th Cir.1983). At the time summary judgment was granted, the district court was correct in ruling as it did under *Pettibone*. However, the opinion relied on by the district court was subsequently withdrawn. A revised opinion appeared at *Johns v. Pettibone*, 769 F.2d 724 (11th Cir.1985) (*Pettibone II*). And portions of that opinion in turn were recently deleted on rehearing in *Johns v. Pettibone*, No. 84-7361, slip op. (11th Cir. Nov. 12, 1985) (per curiam) (*Pettibone III*). By the latter order, this Court also denied a petition for rehearing *en banc*.

*Pettibone III* establishes that the rule that "a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the

actor's line of duty." *Pettibone III,* slip op. at 527 [769 F.2d at 728]. Thus, in granting summary judgment the district court erred as a matter of law in applying only one part of the immunity test — whether the act was in the scope of the employees' duties — without determining whether the challenged conduct was or was not discretionary.

Appellants' efforts to persuade us to abandon the *Pettibone III* rule are unavailing. It is the law of this Circuit. Plaintiffs have alleged undisputed facts sufficient to create a material question of whether or not defendants' complained-of acts were discretionary. Summary judgment was thus inappropriate.

Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS.

[Filed June 5, 1985]

## MEMORANDUM OF OPINION

Plaintiffs commenced this action in state court against the three named defendants and a variety of fictitious defendants seeking to recover for injuries allegedly inflicted upon plaintiff William T. Erwin, Sr. at his work place while an employee of the United States Government at the Anniston Army Depot. The three named defendants are alleged to be co-employees and/or supervisors. Defendant Westfall timely removed the entire action to this court and all three defendants have now filed a motion to dismiss, or in the alternative for summary judgment. Plaintiffs have filed an objection to the removal and to the dismissal, which objection the court treats as a motion to remand to the state court.

The motions came on for hearing at a scheduled motion docket held May 10, 1985. At the conclusion of the hearing counsel for plaintiffs requested the opportunity to submit a

brief on the issues embodied in the motions. The court gave counsel two weeks, which period at the request of counsel was twice extended, with the final deadline for briefs being June 3, 1985. The motions are now ripe for a decision thereon.

The motion for summary judgment is supported by affidavit and points out that the three named defendants were employees of the United States acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of the ordinary tort claims which are stated in the complaint. The affidavit of plaintiff William T. Erwin does not traverse the fact that the alleged tort was committed within the scope of defendants' jobs. Indeed, the Erwin affidavit almost admits that the acts or omissions of defendants took place at the work site of defendants and within the scope of their jobs. These three defendants are therefore absolutely immune from suit on account of the matters alleged in the complaint and the motion for summary judgment as to them will be granted by separate order. *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985). Plaintiffs seek to avoid the effect of the holding in *Pettibone* by observing that *Pettibone* does not discuss discretionary, non-discretionary and ministerial functions. No such discussion was necessary. The law of the Eleventh Circuit is clear that absent an allegation of a tort of constitutional magnitude, any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs. *Evans v. Wright,* 582 F.2d 20 (5th Cir. 1978).

Plaintiffs included in the complaint a variety of fictitious defendants and as to them the court will remand this action to the state court. The remand will be without prejudice to any defendant substituted for a fictitious defendant hereafter served removing the action to this court. In this regard, the court notes that it is entirely likely that any defendant substituted for fictitious defendants No. 1 and No. 2 (and possibly other fictitious defendants) will also be immune as employees of the government acting within the scope or [*sic*] their official duties.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK

UNITED STATES DISTRICT JUDGE

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS.

[Filed June 5, 1985]

### ORDER

In accordance with the Memorandum of Decision this day entered, it is

ORDERED, ADJUDGED and DECREED that the motion of defendants Rodney P. Westfall, Osborn Rutledge and William Bell for summary judgment in their favor is GRANTED and they are DISMISSED as defendants, with prejudice.

The claims of plaintiffs against all fictitious defendants are REMANDED to the Circuit Court of Jefferson County, Alabama, from whence they were removed. The clerk of court is directed to send a copy of this order to the clerk of such state court.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

# APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 85-7437

---

D.C. Docket No. 85-0874

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL, OSBORN RUTLEDGE,
WILLIAM BELL, ET AL., DEFENDANTS-APPELLEES.

---

Appeal from the United States District Court for
the Northern District of Alabama

---

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, District Judge.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 8, 1986
For the Court:
Spencer D. Mercer, Clerk

By: /s/ AARON A. GODFREY
*Deputy Clerk*

# APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 85-7437

---

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

*v.*

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS-APPELLEES.

---

Appeal from the United States District Court for
the Northern District of Alabama

---

[Filed June 2, 1986]

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*ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC* (Opinion APRIL 8, 1986, 11 Cir., 198___, _____ F.2d _____). (JUNE 2, 1986)

Before JOHNSON and HATCHETT, Circuit Judges, and MURPHY*, U.S. District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON JR.

United States Circuit Judge

(3)

No. 86-714



# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## REPLY MEMORANDUM FOR THE PETITIONERS

---

CHARLES FRIED
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 86-714

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

**REPLY MEMORANDUM FOR THE PETITIONERS**

---

1. Respondents' principal argument against certiorari is that there is no conflict among the courts of appeals regarding the scope of federal employees' immunity from liability under state tort law for injuries caused by their official acts.[1] Respondents are clearly wrong.

First, the Eighth Circuit in *Poolman* v. *Nelson*, 802 F.2d 304 (1986), concluded that federal employees are immune from state tort law liability as long as they act within the scope of their official duties, expressly rejecting the view of

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[1]We address here the arguments opposing certiorari advanced by respondents in the present case and the respondents in two pending cases that present the identical question. See *Deschambault* v. *Sowell*, petition for cert. pending, No. 86-833; *Potts* v. *Heathcoat*, petition for cert. pending, No. 86-862. We suggested in the petitions in *Deschambault* and *Potts* that the Court hold those cases pending its disposition of the petition in the present case.

several other courts of appeals (see Pet. 6-9) that immunity is available only to employees who exercise a measure of discretion. The court in *Poolman* observed that it previously had "found federal officials subject to personal liability for tortious activity because their activity was not within the outer perimeter of their line of duty without expressly drawing the line between discretionary and ministerial activity" (802 F.2d at 307). Acknowledging that "some circuits have adopted the discretionary function requirement as an element in determining whether a federal official is immune from a common law tort cause of action," the court rejected such a "bright-line distinction[] between discretionary and ministerial acts" (*id.* at 308 (footnote omitted)). It concluded that a federal employee is entitled to immunity as long as he acts "within the outer perimeter of his scope of authority" and that the quantum of discretion exercised by the employee is relevant only insofar as it sheds light upon the scope of the official's authority (*id.* at 307-308).

There is no support for respondents' claim (86-714 Br. in Opp. 2; 86-862 Br. in Opp. 3) that the Eighth Circuit's decision in *Poolman* can be reconciled with the rule applied by the Eleventh Circuit in the present case because the government official named as the defendant in *Poolman* exercised policy making responsibility. The *Poolman* court never indicated that the defendant was a policy maker. Indeed, the court's description of the duties performed by the defendant as county supervisor for the Farmers Home Administration indicates that the court viewed the defendant as simply responsible for supervising the administration of the loan program in a particular geographic area (802 F.2d at 309 & n.4). Moreover, the conduct challenged by the plaintiffs in *Poolman*—alleged misrepresentations in the course of informing the plaintiffs of the status of their loan application—certainly cannot be characterized as a policy making activity.

Second, leaving *Poolman* aside, there is a conflict among the courts of appeals regarding the quantum of discretion that an employee must exercise in order to be entitled to immunity (see Pet. 6-9).[2] Respondents argue (86-714 Br. in Opp. 2-3; 86-862 Br. in Opp. 5-6 & n.3) that the decisions of the courts of appeals are distinguishable on their facts. But the courts of appeals plainly have announced different legal standards and, as we show in our petition, these standards can lead to irreconcilable results.

Third, respondents' assertion (86-714 Br. in Opp. 3) that it is not possible to adopt a definitive rule governing federal employees' immunity from state law tort liability demonstrates the serious defect in the manner in which the courts of appeals have defined the scope of official immunity in this context. The purpose of immunity is to eliminate the chill upon independent and vigorous government action that is likely to result from the fear of personal monetary liability. That purpose will be served only if federal employees can reasonably anticipate when their conduct may give rise to liability for damages (*Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). The standards adopted by the courts of appeals make the availability of immunity so uncertain that an official simply cannot know whether he will be protected from personal liability. As a result, the immunity rule cannot fulfill its purpose of ensuring the effective functioning of government.

---

[2]The respondent in No. 86-833 acknowledges this conflict (Br. in Opp. 14), but asserts that review is not warranted in that case because the petitioners would not be entitled to immunity under any discretion-based standard. Whether or not that assertion is correct, in view of our argument that federal employees are entitled to immunity when they act within the scope of their official duties without regard to whether they exercise discretion, this Court should hold that case if it grants the petition here, and dispose of the case as appropriate in light of the disposition in *Westfall*.

2. Respondents also assert that review is not warranted because the decisions below are correct on the merits (86-714 Br. in Opp. 4-5; 86-833 Br. in Opp. 5-9, 11-13; 86-862 Br. in Opp. 7-8). The arguments raised by respondents are discussed in our petition (at 9-20), and the sharply conflicting positions of the parties about the meaning of *Barr* v. *Matteo*, 360 U.S. 564 (1959), and its progeny support the conclusion that this Court should grant the petition to consider the scope of federal employees' immunity in this context.

For the foregoing reasons, and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

FEBRUARY 1987

No. 86-714

# In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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57 pp

## QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

II

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Osburn Rutledge and William Bell were defendants in the district court and are petitioners in this Court.

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*Nietert* v. *Overby*, No. 84-1049 (10th Cir. Apr. 22, 1987) ..... 30, 32
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5 F. Harper, F. James & O. Gray, *The Law of Torts* (1986) ..... 26, 34
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-714

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE PETITIONERS

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 785 F.2d 1551. The opinion of the district court (Pet. App. 4a-7a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on April 8, 1986. A petition for rehearing was denied on June 2, 1986 (Pet. App. 10a-11a). On August 20, 1986, Justice Powell issued an order extending the time for filing a petition for a writ of certiorari to and including September 30, 1986; on September 22, 1986, Justice Powell is-

sued an order further extending the time within which to file a petition to and including October 30, 1986. The petition was filed on that date and was granted on March 2, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## STATEMENT

1. This is a state law tort action in which respondents seek monetary damages from petitioners, all of whom are federal employees, for injuries allegedly caused by conduct that was within the scope of petitioners' official duties.

Respondents William T. Erwin, Sr. and his wife, Emely Erwin, commenced this action in Alabama state court, alleging that William was injured while working as a civilian warehouseman at the Anniston Army Depot when he came into contact with "bags or containers of soda ash [that] were improperly and negligently stored" (Complaint 3). Respondents assert that he "picked up a bag of soda ash and inhaled some of the soda ash dust that had spilled from the bag" (Erwin Affidavit filed June 4, 1985, at 1), that as a result of his contact with the soda ash he sustained chemical burns in his eyes and throat, and that "[s]ince that day * * * the general quality and volume of [his] voice has been greatly diminished" (*ibid.*; Complaint 4). They further assert that the soda ash "should not have been routed to the warehouse where [Erwin] was working," and that "someone should have known that it was there and provided [him] with some warning as to its presence and danger before [he] inhaled it" (Erwin Affidavit 1).[1]

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[1] The complaint also alleges that the bags containing the soda ash were "negligently designed or manufactured," or,

Petitioners, three federal employees who are supervisors at the Anniston Army Depot, are charged in the complaint with negligence "in proximately causing, permitting, or allowing [William Erwin] to inhale" the soda ash (Complaint 4). Petitioner Rodney P. Westfall is the chief of the Receiving Section at the Depot, Osburn Rutledge is the chief of the Breakdown and Bulk Delivery Unit, and William Bell is the chief of Unloading Unit No. 1 (Fomby Affidavit filed April 4, 1985, at 1). The complaint (at 1-2) also lists as defendants 21 unnamed individuals or entities. William Erwin seeks damages in the amount of $500,000; Emely Erwin seeks $25,000 in damages for loss of consortium (Complaint 4, 5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1) and filed a motion to dismiss or, in the alternative, for summary judgment on the ground that they were absolutely immune from suit. Respondents opposed the motion, asserting that a federal employee is entitled to immunity from tort liability only if the employee is engaged in policymaking activities.[2] The district court

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alternatively, "that the manufacturers or distributors of such bags issued inadequate warnings concerning their use and storage" (Complaint 3).

[2] William Erwin filed an affidavit stating that petitioners "are not involved in any policy-making work for the United States Government. Their job duties are similar to mine, with the addition of their supervisory responsibilities. Therefore, [i]t is my understanding that their duties only require them to follow established procedures and guidelines. We all work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit 2).

granted the motion and dismissed the action against petitioners (Pet. App. 4a-7a). The court first found no dispute regarding petitioners' allegation, made by affidavit, that they were "acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of" respondents' tort claims (*id.* at 5a). Relying upon *Johns* v. *Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985), the district court stated that "[t]he law of the Eleventh Circuit is clear that * * * any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs," and held that petitioners were "absolutely immune from suit on account of the matters alleged in the complaint" (Pet. App. 5a).

2. The court of appeals reversed (Pet. App. 1a-3a). It observed that "the opinion [in *Johns* v. *Pettibone Corp.*, *supra*] relied on by the district court was subsequently withdrawn" (*id.* at 2a). The revised opinion "establishes the rule that 'a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty' " (*id.* at 3a, quoting *Johns* v. *Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) (emphasis in original)). Finding that respondents had "alleged undisputed facts sufficient to create a material question of whether or not [petitioners'] complained-of acts were discretionary," the court reversed the grant of summary judgment and remanded the action for further proceedings (Pet. App. 3a).[3]

[3] Although the court of appeals did not define the term "discretion" in its decision in the present case, another panel of the Eleventh Circuit subsequently stated that " '[d]iscretionary acts' involve planning or policy considerations and do

## SUMMARY OF ARGUMENT

This action was brought under Alabama state law to recover damages from several federal supervisory employees for personal injuries said to have resulted from the alleged improper delivery and storage of soda ash at an Army civilian warehouse. There is substantial reason to conclude, as have the Fourth and Eighth Circuits, that federal employees are absolutely immune from personal liability under state tort law for acts committed within the scope of their employment. A rule of absolute immunity for actions taken within the scope of employment would eliminate uncertainty as to the scope of immunity protection in state tort law actions, and would most effectively assure that federal functions are performed in a manner free of inhibition and without excessive cost to the government.

This rule is especially important in cases such as this one, where discretionary conduct is at issue. This Court's recent decisions involving the scope of government employees' immunity from constitutional tort actions establish that the protection of the free exercise of discretion is an important factor weighing on the side of conferring immunity protection. Whether or not the Court determines to recognize the broader immunity for all acts within the scope of employment, therefore, it should recognize immunity from liability under state tort law for such acts as involve the exercise of discretion—that is, wherever the law fails to specify the precise action that the official must take in each instance.

Application of immunity to protect federal employees who exercise even minimal discretion in

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not concern day to day operations" (*Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (1986)).

performing their official duties is fully supported by this Court's decisions, going back almost to the beginning of the Republic. Such protection from suit is necessary to avoid the disruption of federal governmental functions by diverting energy and resources into the litigation process, by inhibiting vigorous performance of duties, and by influencing discretionary decisions in a manner likely to avoid risk of personal liability. Such immunity from state tort law actions also helps to assure that the laws of the separate states will not interfere with the dictates of federal law concerning the performance of federal governmental functions.

The rule adopted by some courts—recognizing immunity from state law tort actions only in instances of "policymaking" discretion—does not provide the protection necessary to ensure the effective functioning of the federal government. Not only does such an approach subject a broad range of discretionary federal decisions to liability under state law; it creates great uncertainty for large categories of employees making plainly discretionary decisions in areas such as personnel management, law enforcement, and benefit program administration.

The limiting of immunity protection to acts of policy level discretion cannot be justified by analogy to the discretionary function exception of the Federal Tort Claims Act (FTCA) (28 U.S.C. 2680(a)). Congress's definition of the scope of that exception was intended to address only the proper limits on governmental liability, and was not informed by the additional concerns, including the impact on the decisionmaking process, that are implicit in suits asserting individual liability. In any event, given the range of governmental activities excepted from the FTCA's waiver of sovereign immunity—by a number of pro-

visions of which the discretionary function exception is just one—a personal immunity for minimally discretionary conduct within the scope of employment is essential to protect Congress's determination that certain federal actions should not be tested in court by reference to state tort law.

The recognition of a broad immunity from state law tort actions leaves in place substantial remedies both to deter improper conduct and, in many instances, to compensate those injured. It applies, of course, only to actions within the outer perimeter of an employee's duties, and thus in no way interferes with suits challenging wholly unauthorized actions of federal employees. Where the immunity is applicable, the government retains a power, which has been regularly exercised, to discipline or discharge employees who act improperly. And in many instances, persons who are denied a right of action against an individual defendant on the basis of immunity retain meaningful avenues of relief under the Federal Employees' Compensation Act or the FTCA.

Recognition of immunity in this situation is also wholly compatible with the immunity doctrine articulated by this Court in constitutional tort cases. The prerequisite to immunity in the latter category of cases—that the defendant not have violated a clearly established constitutional right—is justified by the favored position of federal constitutional rights. There is thus, by definition, no justification for a parallel requirement in a state tort law case. Further, if an additional requirement that there be no violation of clearly established law were imposed, practical problems would render ineffectual the resulting immunity protection. Such an inquiry would

necessarily be concerned not only with state law, but with the interaction of state law principles and the directives of federal law concerning the federal functions being performed. We submit that a conclusion of liability in such a situation will almost never be so clear as to justify denying immunity under such a test. Thus the test, if properly applied, would result in no meaningful limitation on the availability of immunity. Its primary effect would be to generate uncertainty and provide a subject for pointless and harmful litigation.

In sum, federal employees acting within the scope of their employment—and most clearly those exercising a modicum of discretion—are entitled to immunity from state law tort suits. Respondents' tort action was therefore properly dismissed by the district court.

## ARGUMENT

### PETITIONERS ARE ENTITLED TO IMMUNITY FROM PERSONAL LIABILITY IN THIS STATE TORT DAMAGE ACTION FOR INJURIES CAUSED BY CONDUCT WITHIN THE SCOPE OF PETITIONERS' OFFICIAL DUTIES

This case concerns the extent to which a federal employee is immune from personal liability in damages under state tort law for injuries allegedly caused by the employee's official acts. The scope of the immunity afforded to federal employees is, of course, a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress" (*Howard* v. *Lyons*, 360 U.S. 593, 597 (1959)).[4] And the basic elements of that federal

[4] As the Court stated in *Howard*, "[t]he authority of a federal officer to act derives from federal sources, and the rule

standard were established by this Court in the landmark decision in *Barr* v. *Matteo*, 360 U.S. 564 (1959).

In *Barr*, a group of former employees of the federal Office of Rent Stabilization alleged that they had been libeled by a press release issued at the direction of the defendant, who was at the time acting director of the office. Justice Harlan, writing for a plurality of four Justices, stated that the defendant was immune because "[t]he fact that the action [that formed the basis for the libel suit] was within the outer perimeter of [the defendant's] line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint" (360 U.S. at 575). Justice Black concurred on the ground that the tort action challenged the disclosure of information about the functioning of government. "[I]f federal employees are to be subjected to such restraints in reporting their views about how to run the government better," he stated, "the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia" (*id.* at 577 (footnote omitted)). Justice Stewart agreed with the plurality's analysis of the "principles that should guide decision in this troublesome area of law," but dissented from the judgment because he concluded that the issuance of the press release was outside the scope of the defendant's official duties (*id.* at 592). In *Howard* v. *Lyons*, *supra*,

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which recognizes a privilege * * * is one designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States" (360 U.S. at 597).

a majority of the Court—the *Barr* plurality joined by Justice Stewart—adopted the standard announced by the plurality in *Barr*, applying that rule to immunize a federal employee from liability under state libel law for damages allegedly caused by the federal employee's official acts (360 U.S. at 597-598).

In the years since *Barr*, the courts of appeals have considered the scope of federal employees' immunity in the context of a wide variety of tort claims, and have applied the immunity rule announced in *Barr* not only to libel actions, but to all tort claims under state law. *McKinney* v. *Whitfield*, 736 F.2d 766, 768-769 (D.C. Cir. 1984); *Miller* v. *DeLaune*, 602 F.2d 198, 200 (9th Cir. 1979) (per curiam); *Norton* v. *McShane*, 332 F.2d 855, 859-860 & n.5 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965); see also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807-808 (1982) (characterizing *Barr* as according "absolute immunity from suits at common law"); *Butz* v. *Economou*, 438 U.S. 478, 494-495 (1978).

This case brings before the Court a question on which the courts of appeals have not been able to agree—the issue of the types of official actions for which federal employees may receive protection from personal liability under the *Barr* immunity principle. Notwithstanding the *Barr* plurality's statement that immunity from tort liability "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government," and its conclusion that immunity is available to "officers of lower rank in the executive hierarchy,"[5] the courts of appeals have reached a

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[5] 360 U.S. at 572-573 (footnote omitted); see also *id.* at 587 n.4 (Brennan, J., dissenting) (observing that "[t]he opinion's rationale covers the entire federal bureaucracy").

variety of conclusions regarding the class of federal employees entitled to protection under *Barr*.

Two courts of appeals have held that *Barr* extends immunity to all federal employees, regardless of the nature of their duties or their place in the federal hierarchy. See *General Electric Co.* v. *United States*, 813 F.2d 1273, 1276-1277 (4th Cir. 1987); *Poolman* v. *Nelson*, 802 F.2d 304, 307 (8th Cir. 1986). Other courts have restricted immunity to federal employees who exercise discretion, but have reached almost the same result by concluding that the authority to exercise very limited discretion is sufficient to justify immunity.[6]

On the other hand, some courts have taken a restrictive approach, extending protection from liability only to federal employees of a particular rank. The version of this approach applied by the court below in the present case, and by other courts as well, limits the benefit of immunity to federal employees who exercise policymaking authority.[7] Other courts

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[6] *Granger* v. *Marek*, 583 F.2d 781 (6th Cir. 1978); *Green* v. *James*, 473 F.2d 660, 661 (9th Cir. 1973); *Estate of Burks* v. *Ross*, 438 F.2d 230, 234 (6th Cir. 1971).

[7] *Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986); *Araujo* v. *Welch*, 742 F.2d 802, 804 (3d Cir. 1984); *Jackson* v. *Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc). The Eleventh Circuit apparently has decided to reconsider its rule that only policymakers are eligible for immunity. In *Andrews* v. *Benson*, 809 F.2d 1537 (11th Cir. 1987), the panel applied that rule to hold that the defendants were not entitled to immunity (809 F.2d at 1542). Judge Hill concurred specially, stating that the Eleventh Circuit rule was based on a misreading of *Barr* (809 F.2d at 1544). The full court of appeals granted the defendants' suggestion for rehearing en banc and

have utilized an ad hoc approach in determining "whether judicial scrutiny of a disputed official act might inhibit official policymaking and thus unduly interfere with the efficient operation of government." [8]

There is substantial basis for concluding, as have the Fourth and Eighth Circuits, that federal employees are protected by immunity from suits for damages under state tort law whenever their conduct falls within the scope of their official duties. Protection of federal employees from the risk of personal liability resulting from the performance of their jobs is fundamentally necessary if those jobs are to be performed in a manner free of inhibition and without excessive cost to the government.[9] Moreover, there is much in the decisions of this Court to suggest that immunity is appropriate in the instance of state tort law actions, without regard to

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vacated the panel opinion. See *Andrews* v. *Benson*, No. 86-7049 (11th Cir. May 11, 1987).

[8] *Gray* v. *Bell*, 712 F.2d 490, 505-506 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); see also *Norton* v. *McShane*, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965).

[9] For example, imposing personal liability upon the social security officials whose actions were at issue in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), would certainly deter individuals from seeking federal employment and chill incumbent officials from performing their duties. And adopting a uniform standard under which all federal employees would be immune from liability under state law as long as their actions fell within the scope of their duties would not only enable courts to quickly rule on immunity claims, without the need for a burdensome inquiry into the nature of an employee's duties, but would greatly enhance the employee's sense of certainty in the immunity protection afforded to him.

whether the conduct in issue is discretionary or ministerial in nature.[10]

In any event, there can be no doubt, following several of this Court's decisions in the context of constitutional tort actions, see, *e.g.*, *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), that the presence of discretionary conduct on the part of the federal employee adds an important additional consideration—the protection of the unbiased exercise of that discretion—on the side of recognizing immunity. We submit that this addi-

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[10] The Court has explicitly recognized that employees performing ministerial tasks are entitled to immunity in a variety of circumstances. Such immunity clearly applies "as to acts done in connection with a mandatory duty" (*Barr* v. *Matteo*, 360 U.S. at 575 (plurality opinion); see also page 15, *infra*), or in the implementation of a discretionary determination made by a superior, as long as that determination falls within the scope of his official duties. *Doe* v. *McMillan*, 412 U.S. 306, 323 (1973); *id.* at 342 (opinion of Rehnquist, J.); cf. *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953). Of course, these immunity principles are not limited to situations in which the federal employee properly performs his duties. The protection provided to an employee would be quite illusory—it would go no further than the protection always available based on the substantive law—if his eligibility for immunity were to depend upon whether he satisfied a standard of perfection.

Moreover, requiring the federal employee to answer in damages under state law for failing to perform properly a ministerial duty appears indistinguishable in practice from implying a private right of action for the breach of the ministerial duty itself. Accordingly, at least where the standards set forth by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), preclude the recognition of a private action under federal law, a state law damage action might well be inappropriate.

tional consideration is wholly applicable in this case, where a clear form of discretionary conduct is obviously in issue. Whatever the Court might conclude in a case raising the issue of immunity in a wholly ministerial context, therefore, it is quite clear that a federal employee is entitled to immunity whenever the conduct that is the basis for the state tort claim falls within the scope of the employee's official duties and involves the exercise of a minimal quantum of discretion. That quantum of discretion exists whenever the law "fails to specify the precise action that the official must take in each instance" (*Davis* v. *Scherer*, 468 U.S. at 197 n.14). Petitioners plainly are entitled to immunity under that standard.[11]

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[11] If, despite our submission, the Court is not inclined to apply the immunity rule announced in *Barr* to all employees who exercise discretion and act within the outer perimeter of their duties, it should recognize a separate rule of immunity protecting all such federal employees from liability for negligence. An employee whose actions are merely negligent has not, by definition, acted in a manner that is "plainly incompetent" or "knowingly [in] violat[ion] [of] the law" (*Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5). Indeed, in describing the scope of qualified immunity in *Butz* v. *Economou*, *supra*, the Court stated that "[f]ederal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." 438 U.S. at 507; see also pages 16-18, *infra* (discussing immunity available to federal employees in the absence of proof of malice). An employee therefore should not be subjected to liability in damages for negligently performing his official actions. Because the complaint in this action alleges only negligence (see pages 2-3, *supra*), petitioners are entitled to protection under this more limited immunity standard.

### A. This Court's Decisions Indicate That A Federal Employee Need Not Exercise More Than Minimal Discretion In Order To Be Accorded Immunity In An Action Under State Tort Law

Beginning with its earliest cases, this Court recognized that federal employees are in some circumstances entitled to immunity from liability in damages for injuries caused by their official actions. This recognition of immunity has rested on an awareness of the need to protect officials in the exercise of their governmental responsibilities, especially where those responsibilities involve choices between various actions that might be taken. In *Crowell* v. *McFadon*, 12 U.S. (8 Cranch) 94 (1814), for example, a customs collector detained a vessel pursuant to an embargo statute providing that he could do so "if, in his opinion, it was the intention to violate or evade any of the provisions of the embargo laws, and his conduct was approved and confirmed by the president" (12 U.S. (8 Cranch) at 98). The Court rejected an action for resulting damages, observing that "[t]he law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it" (*ibid.*).

It follows that when an official properly performs an act authorized by federal law, he may not be held liable in damages. *Erskine* v. *Hohnbach*, 81 U.S. (14 Wall.) 613, 616 (1871); *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 865-866 (1824); cf. *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal officer who does an act authorized by federal law that was "no more than what was necessary and proper for him to do, * * * *cannot* be guilty of a

crime under [state] law") (emphasis in original); see generally pages 27-30, *infra*. But this immunity was never limited to situations in which a federal employee properly performed his duties. In a number of early cases, the Court made clear that liability was barred, at least in some instances, even when the official act turned out to be improper.

In *Otis* v. *Watkins*, 13 U.S. (9 Cranch) 339 (1815), for example, the applicable federal statute authorized detention of a vessel by a customs collector "whenever in [his] opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon" (Act of Apr. 25, 1808, ch. 66, § 11, 2 Stat. 501). In an action in trespass, this Court found error in a jury instruction authorizing liability if the defendant collector acted negligently in detaining the vessel. "[T]he law exposes his conduct to no such scrutiny," the Court stated. "If it did, no public officer would be hardy enough to act under it" (13 U.S. (9 Cranch) at 355-356). The Court found that the collector was entitled to immunity from liability so long as he "honestly entertained the opinion under which he acted" (*id.* at 356), and there was no proof of "malice or other circumstances which may impeach the integrity of the transaction" (*ibid.*).

The Court reached a similar conclusion in *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87 (1845), where the Postmaster General was sued for "illegally [and] maliciously" (*id.* at 88) suspending a monetary credit on the books of the Post Office Department to which the plaintiffs were entitled under their contract with the Department. The Court held that the plaintiffs could not recover damages as long as the

Postmaster General had acted in good faith, observing that where the action involved "is not merely a ministerial one," but requires the "exercise [of] judgment and discretion," a public officer is not liable because he "falls into error" (44 U.S. (3 How.) at 98). The Postmaster General "committed an error in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally decided. But as the case admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him." *Id.* at 98-99; see also *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 404 (1851); *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89, 129-132 (1849).

Thus, prior to *Spalding* v. *Vilas*, 161 U.S. 483 (1896), a government employee could be required to answer in damages for his official actions only where: (1) he acted with malice; (2) "the law require[d] absolutely a ministerial act to be done by [the] public officer, and he neglect[ed] or refuse[d] to do such act" (*Amy* v. *The Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870)); or, (3) the employee "acted outside of his federal statutory authority." *Butz* v. *Economou*, 438 U.S. 478, 490 (1978); see *Bates* v. *Clark*, 95 U.S. 204, 209 (1877); *Teal* v. *Felton*, 53 U.S. (12 How.) 284, 291 (1851); *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

In *Spalding*, the Court eliminated malice as a condition giving rise to personal liability. The plaintiff there sought money damages from the Postmaster General, alleging that the Postmaster General had issued a circular containing false statements in an effort to injure the plaintiff. This Court found that

the defendant's conduct was within the scope of his official duties and held that he was immune from liability even if he had acted with malice (161 U.S. at 498-499):

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

The immunity doctrine as applied in *Spalding* was reaffirmed by a plurality of this Court in *Barr* v. *Matteo*, *supra*.[12] Concluding that the availability of immunity cannot be and never had been restricted to executive officers of cabinet rank (360 U.S. at 572), the plurality stated that it is "the duties with which the particular officer * * * is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,'—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits" (*id.* at 573-574 (citation omitted)). Thus, although *Barr* itself involved "an official of policy-making rank" (360 U.S. at 575), the plurality in *Barr* did not restrict immunity to federal employees who exercise a particular quantum of discretion.

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[12] As we have discussed (see pages 9-10), the plurality's legal analysis was endorsed by Justice Stewart (360 U.S. at 592) and subsequently adopted by a majority of the Court in *Howard* v. *Lyons*, *supra*.

See *General Electric Co.* v. *United States*, 813 F.2d at 1276-1277 & n.3; *Poolman* v. *Nelson*, 802 F.2d at 307; *Lojuk* v. *Johnson*, 770 F.2d 619, 626-627 (7th Cir. 1985); *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456, 463-464 (1st Cir. 1985). "The fact that the action here taken [by the defendant] was within the outer perimeter of [his] line of duty [was] enough to render the privilege applicable" (360 U.S. at 575).[13]

Indeed, the plurality's only discussion of the fact that the defendant in *Barr* did exercise discretion was in connection with its determination that the challenged conduct was within the outer perimeter of his line of duty. The plurality took pains to point out that, because the defendant's responsibilities were discretionary in nature, the absence of specific statutory authority for the challenged conduct did not divest the defendant of the protection of immunity (360 U.S. at 575 (emphasis in original; footnote omitted)):

> That [the defendant] was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory

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[13] Some courts have seized upon the statement in *Barr* that "the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions" (360 U.S. at 573). But the plurality simply was referring to the fact that the greater the official's authority, the "broader the range of [his] responsibilities and duties," and, therefore, the wider the outer perimeter of his line of duty (*ibid.*). The statement in no way indicates that lower level officials are not protected by immunity.

duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

The Court has not, since *Barr*, squarely considered, the scope of federal employees' immunity from liability in a state law tort action.[14] Accordingly, the

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[14] In *Doe* v. *McMillan*, 412 U.S. 306 (1973), the Court considered whether the Public Printer and the Superintendent of Documents were entitled to immunity in an action in which the plaintiffs sought damages for both constitutional violations and common law torts allegedly committed by those officials in connection with the production and distribution of a congressional committee's report. The Court concluded that the officials did not have "an independent immunity," but instead were immune from damages liability to the extent that employees of the government entity for which they performed printing services would have been entitled to immunity in connection with the production and distribution of the printed material; the officials' immunity in *Doe* therefore turned upon the scope of legislative immunity (412 U.S. at 323).

The Court in *Doe* did discuss *Barr* and at one point stated that "[j]udges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. But policemen and like officials apparently enjoy a more limited privilege" (412 U.S. at 319 (citations omitted)). However, the Court did not indicate whether this statement referred to immunity from constitutional claims or immunity from tort claims; indeed, it supported the reference to a "more limited privilege" by citing *Pierson* v. *Ray*, 386 U.S. 547 (1967), a case that addressed a police officer's immunity from liability for violations of the Constitution. In view of this ambiguity, and the fact that limiting the scope of immunity under *Barr* was not necessary —or even relevant—to the ground of decision in *Doe*, the Court's brief reference to the scope of immunity cannot be viewed as announcing a restrictive view of the class of federal officials exercising discretionary authority who are entitled to official immunity in the state tort context. See also *Doe*,

rule announced in the Court's early decisions—that all federal employees who exercise discretion are entitled to immunity in connection with acts within the scope of their official duties—remains good law today.

This Court's recent discussion in *Davis* v. *Scherer*, *supra*, concerning the types of official conduct entitled to immunity in an action alleging constitutional violations, confirms the vitality of that long-standing principle. In *Davis*, a discharged state employee sought damages under 42 U.S.C. 1983, asserting that state officials had violated his right to due process by failing to provide him with either a formal pre-termination hearing or a prompt post-termination hearing, as required by state regulations. The defendants' claim of immunity was opposed on the ground that, by failing to comply with the state regulation setting forth the procedures to be followed in connection with a discharge, the defendants had

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412 U.S. at 342 (Rehnquist, J., concurring in part and dissenting in part) (appearing to take a broad view of *Barr* by stating "[t]here is no immunity [under *Barr*] when officials are simply carrying out the directives of officials in the other branches of Government, rather than performing *any discretionary function of their own*") (emphasis added)). Even if that portion of *Doe* is read as addressing the scope of lower level federal employees' immunity from liability under state law, it indicates only that such employees are entitled to a "more limited privilige," dependent upon the employee's good faith, not that they should be deprived of all immunity from personal liability. See also page 14 note 11, *supra*.

For the same reasons, the Court's statement in *Harlow* v. *Fitzgerald*, *supra*, that *Barr* applies to "high" government officials (457 U.S. at 807-808) cannot be read as a limitation upon the scope of the *Barr* rule. *Harlow* concerned official immunity from damages for constitutional violations; any discussion regarding immunity from liability for state law torts is therefore dictum.

breached a "ministerial" duty. According to the plaintiff, the regulation "deprived [the defendants] of all discretion in determining what procedures were to be followed prior to discharge," and the defendants were not entitled to immunity under the standard of *Harlow* v. *Fitzgerald*, *supra*, which allows immunity for "discretionary, but not ministerial, functions." 468 U.S. at 196 n.14; see *Harlow* v. *Fitzgerald*, 457 U.S. at 818 (immunity is available to "government officials performing discretionary functions").

This Court rejected that argument and held that the state regulation "left to [the defendants] a substantial measure of discretion" (468 U.S. at 197 n.14). Invoking the definition of discretion adopted in its early cases addressing federal employees' immunity from tort liability, the Court concluded that the defendants' duties were sufficiently discretionary to warrant the protection of official immunity. It stated that "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." *Ibid.* (citing *Kendall* v. *Stokes*, 44 U.S. (3 How.) at 98); see pages 16-17, *supra*; cf. *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 613-614 (1838) (distinguishing between ministerial and discretionary duties in the mandamus context).[15]

The definition of discretion applied by the Court in *Davis* has been applied by the courts of appeals to

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[15] The Court rejected the plaintiff's argument for the additional reason that "breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the [plaintiff's] cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties" (468 U.S. at 196-197 n.14).

resolve qualified immunity claims under the *Harlow* standard. See, *e.g.*, *Gagne* v. *City of Galveston*, 805 F.2d 558, 559-560 (5th Cir. 1986); *Thorne* v. *City of El Segundo*, 802 F.2d 1131, 1138 n.7 (9th Cir. 1986). It should also be applied to determine whether immunity is warranted in an action for damages under state tort law. There is no reason that these two kinds of immunity should protect different types of conduct or different classes of federal employees, especially in view of the fact that the *Davis* standard is based upon the rule set forth in this Court's decisions in the common law tort context. See *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985) (applying *Davis* test in common law tort action). Moreover, creating categories of conduct that are protected by *Harlow* immunity but subject to tort liability under state law would allow prospective plaintiffs to circumvent the *Harlow* rule by framing their claims in state law rather than constitutional terms.[16]

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[16] Plaintiffs seeking damages from federal employees frequently allege that the employees' actions violated both the Constitution and state tort law. See, *e.g.*, *Williamson* v. *United States Dep't of Agriculture*, No. 86-4314 (5th Cir. Apr. 29, 1987), slip op. 3597-3601 (claims arising out of dealings with Farmers Home Administration); *Palermo* v. *Rorex*, 806 F.2d 1266, 1269-1273 (5th Cir. 1987) (claims against supervisors relating to employee disciplinary action); *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987) (claims based on actions by law enforcement officers), reh'g en banc granted on other grounds, No. 85-6071 (D.C. Cir. May 8, 1987); *Augustine* v. *McDonald*, 770 F.2d 1442 (9th Cir. 1985) (claims concerning efforts to collect debt owed to the government by the plaintiff); *Wyler* v. *United States*, 725 F.2d 156 (2d Cir. 1983) (action for damages for entry and search of the plaintiff's apartment by Drug Enforcement Administration agents); *Sprecher* v. *Graber*, 716

**B. Important Policy Considerations Justify The Rule Conferring Immunity From State Law Liability Upon Federal Employees Who Exercise Discretion**

The immunity principle for which we contend is essential to the ability of the federal government to carry out its responsibilities. Immunity is necessary "to aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)) by eliminating the intimidation and disruption of federal activities that might result from actual or potential litigation under state tort law.

1. The plurality in *Barr* observed that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits based on acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571; see also *Spalding* v. *Vilas*, 161 U.S. at 498; *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) at 129-132; *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950).

The job performance of any federal employee, whether his duties are ministerial or discretionary, undoubtedly would be affected by the prospect of litigation and personal liability for harms allegedly caused by his official acts. As this Court has stated more recently in discussing immunity from liability for constitutional torts, "[the] social costs include the

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F.2d 968 (2d Cir. 1983) (claims arising out of investigation by the Securities and Exchange Commission); *Miller* v. *DeLaune*, *supra* (suit against an Internal Revenue Service agent concerning tax collection efforts).

expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" (*Harlow* v. *Fitzgerald*, 457 U.S. at 814).

When a federal employee's official duties involve any exercise of discretion, the possibility of personal monetary liability is also likely to influence the manner in which the employee performs his duties, giving him an incentive to shade his decisions and hedge his conduct so as to avoid the sort of confrontation or controversy that might result in a lawsuit. See *Harlow* v. *Fitzgerald*, 457 U.S. at 814; *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 n.32 (1982). As one court stated in upholding a claim of immunity, "[e]xcept for 'the most resolute, or the most irresponsible,' a Government official * * * would indeed find it difficult honestly and independently to [perform his official duties] if he knew that [his conduct] * * * could subject him to the risk, the inconvenience and the embarrassment of a public trial and to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess" (*Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 658 (2d Cir. 1962)).[17]

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[17] As another court of appeals more recently observed (*Carson* v. *Block*, 790 F.2d 562, 564 (7th Cir. 1986), cert. denied, No. 86-453 (Dec. 15, 1986)),

> [p]rivate firms may buy insurance for their employees, or give them bonuses or shares of the enterprise to induce them to take risks. The United States does not offer [government officials] a "share of the profits" from federal programs * * * and a system under which officials face risks of substantial liability for error without any corresponding prospect of reward for good work is doomed. Only the addled and the foolhardy would dis-

The Court has observed in the context of actions seeking damages for alleged constitutional violations that "[i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974); see also *Butz* v. *Economou*, 438 U.S. at 506-507; *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 319, 321 (1975). Because the threat of liability is likely to cause government employees to "exercise their discretion with undue timidity" (*Wood* v. *Strickland*, 420 U.S. at 321), they are accorded immunity with respect to their discretionary activities. As the plurality recognized in *Barr*, 360 U.S. at 571-572, the same policies justify immunity from liability under state law for federal employees who exercise discretion.[18]

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regard these incentives, and the addled and foolhardy do not execute statutes very well.

It is also significant that, at least where a private employee acts within the scope of his duties, his employer will almost certainly be liable for the employee's actions. See, *e.g.*, Restatement (Second) of Torts § 219 (1965). And, as a practical matter, the employer is much more likely to pay any adverse judgment. In the federal employee context, by contrast, sovereign immunity may bar an action against the government, leaving the employee as the only available defendant. See also 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 29.9, at 660-661 (1986).

[18] In the context of actions seeking damages under state tort law, the immunity doctrine also furthers separation of powers principles. This Court has observed that at the time that Congress enacted the Federal Tort Claims Act "[i]t was believed that claims of the kind embraced by the discretionary

2. In *Butz* v. *Economou*, *supra*, this Court observed that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." 438 U.S. at 489; see also *Barr* v. *Matteo*, 360 U.S. at 577 (footnote omitted) (Black, J., concurring) (any restraint on expressions by federal officials "about

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function exception would have been exempted from the waiver of sovereign immunity by judicial construction" (*United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 810 (1984)). That is because "the exemption for discretionary functions * * * was derived from the doctrine of separation of powers, a doctrine to which the courts must adhere even in the absence of an explicit statutory command" (*Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980)). Judicial scrutiny of discretionary Executive Branch determinations would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and thereby implicate separation of powers concerns (*Varig Airlines*, 467 U.S. at 814).

In order to avoid the latter result, Congress enacted the discretionary function exception to the Federal Tort Claims Act. It was " 'neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.' " *Varig Airlines*, 467 U.S. 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)). Granting immunity to federal employees in connection with their discretionary acts ensures that state law tort actions will not intrude upon separation of powers concerns in a similar manner.

how to run the government better * * * will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia"). The rule immunizing federal officers from liability under state law is thus also supported by the well-settled principle that, absent a congressional determination to the contrary, federal activities must be governed by federal standards, not state law.

It has long been clear that "the [C]onstitution and the laws made in pursuance thereof are supreme; * * * they control the [C]onstitution and laws of the respective States, and cannot be controlled by them" (*M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819)). In the absence of affirmative acquiescence by Congress, "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States*, 319 U.S. 441, 445 (1943) (footnote omitted); see also *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Arizona* v. *California*, 283 U.S. 423, 451 (1931).

And the states may not accomplish that forbidden end indirectly by regulating the conduct of federal employees. In general, state statutes or regulations may not be invoked to bar or punish the performance of official federal duties. In *In re Neagle*, *supra*, for example, the Court held that a United States marshal could not be prosecuted under state criminal law for a murder committed in the course of performing his official duties. 135 U.S. at 75-76; see also *Johnson* v. *Maryland*, 254 U.S. 51 (1920); *Ohio* v. *Thomas*, 173 U.S. 276, 283-284 (1899); *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) at 847-849, 865-

866; cf. *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879).[19]

Recognition of a generally available damage remedy against federal employees for violations of state tort law standards would shape official conduct to conform to those standards as effectively as a criminal statute. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"); see also *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 16 n.19; *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318

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[19] At the same time, this Court has stated that "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. * * * It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence" (*Johnson* v. *Maryland*, 254 U.S. at 56 (citations omitted)).

The Court went on to observe, however, that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under" federal law (254 U.S. at 56-57). We note further that Congress has acted with respect to the traffic law example referred to in *Johnson*, substituting the United States as the defendant in any case in which a federal employee is sued for injuries arising out of his operation of a motor vehicle when acting within the scope of his official duties. 28 U.S.C. 2679(b) and (c); see also note 29, *infra*.

(1981). The availability of defamation actions, for example, would undoubtedly engender reluctance to come forward with information about malfeasance in office, despite the strong federal interest in exposing such wrongdoing. See *Nietert* v. *Overby*, No. 84-1049 (10th Cir. Apr. 22, 1987), slip op. 9-13. Federal standards regulating construction or work place safety might well be effectively supplanted if federal employees could be subject to personal liability under a different and more stringent state tort law standard. Immunity from liability under state law for federal employees who exercise discretion prevents this form of state influence over federal activities. See *Butz* v. *Economou*, 438 U.S. at 489; *Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d at 463.[20]

3. Notwithstanding this Court's decision in *Davis* v. *Scherer*, *supra*, some courts of appeals, including the court below, have insisted that a federal employee is eligible for immunity from a state law tort action only if he exercises discretion relating to "policymaking" rather than to "day to day operations." *Heathcoat* v. *Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986); see also pages 11-12, *supra*. This more limited immunity does not provide the protec-

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[20] It is true that the Federal Tort Claims Act adopted state tort law as the standard for imposing monetary liability upon the United States (see 28 U.S.C. 2674). However, the FTCA also contains 13 separate exceptions to the waiver of sovereign immunity (see 28 U.S.C. 2680(a)-(n)), including the exception for claims arising out of the performance of a "discretionary" function or duty by a federal agency or employee (28 U.S.C. 2680(a)). The United States has thus explicitly declined to authorize the application of state tort standards to a wide variety of federal activities. See page 34, *infra*.

tion for federal employees needed to ensure the effective functioning of the federal government.

As a threshold matter, this Court's decision in *Davis* indicates that the need to ensure the effective functioning of government justifies immunity from liability for a constitutional violation as long as a federal employee exercised a minimum degree of discretion. The same policy therefore justifies immunity from liability under state tort law in that situation as well. Indeed, the case for official immunity is, if anything, stronger in the state tort context because there the immunity rule is supported by the policy barring state interference with federal activities. It certainly would be anomalous to subject *federal* employees to greater liability for violations of *state* law than for violations of *federal* constitutional law.[21]

Moreover, a rule restricting immunity to policymakers would render quite uncertain the proper resolution of the immunity claims of major categories of employees whose entitlement to protection cannot reasonably be doubted. Government supervisors

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[21] We recognize that the policies underlying official immunity apply with greatest force when an employee exercises a substantial amount of discretion, because the broader the discretion, the greater the opportunity to alter conduct in response to the threat of suit. Still, the threat of liability will interfere with a federal employee's execution of his duties whenever the employee has a choice in how he should act. The Court's decision in *Davis* adopting a broad definition of the type of discretion sufficient to trigger an entitlement to immunity indicates its agreement with this analysis. Otherwise, the Court would have concluded that a narrower definition of discretion would have been sufficient to ensure the effective functioning of government.

making individual personnel decisions,[22] law enforcement officers investigating possible wrongdoing,[23] and federal employees who determine whether an applicant qualifies for benefits under a federal program [24] all have regularly received the protection of immunity. That result is appropriate because these employees' duties involve the exercise of discretion, and the prospect of personal liability under state law would hinder the proper performance of those duties. Yet, in most instances, the duties can easily be characterized as either policymaking or operational, depending upon whether one focuses on the range of

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[22] *Palermo* v. *Rorex, supra; Dretar* v. *Smith*, 752 F.2d 1015, 1017 n.2 (5th Cir. 1985); *Oyler* v. *National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984); *McKinney* v. *Whitfield*, 736 F.2d 766 (D.C. Cir. 1984); *Wallen* v. *Domm*, 700 F.2d 124 (4th Cir. 1983); *Lawrence* v. *Acree*, 665 F.2d 1319 (D.C. Cir. 1981); *Mir* v. *Fosburg*, 646 F.2d 342 (9th Cir. 1980); *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), cert. denied, 454 U.S. 940 (1981).

[23] *Wyler* v. *United States, supra; Sprecher* v. *Graber, supra; George* v. *Kay*, 632 F.2d 1103 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Sami* v. *United States*, 617 F.2d 755, 771-773 (D.C. Cir. 1979); *Miller* v. *DeLaune, supra; Granger* v. *Marek, supra; Norton* v. *McShane, supra.*

[24] *Williamson* v. *United States Department of Agriculture, supra; Poolman* v. *Nelson, supra; Johnson* v. *Busby*, 704 F.2d 419 (8th Cir. 1983); *Owyhee Grazing Ass'n* v. *Field*, 637 F.2d 694 (9th Cir. 1981). The same result has been reached with regard to other duties performed by federal employees. See *Nietert* v. *Overby, supra* (reporting of fraud, waste and abuse); *Spencer* v. *New Orleans Levee Board*, 737 F.2d 435 (5th Cir. 1984) (weather forecasting); *Queen* v. *TVA*, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (evaluation of product effectiveness); *Evans* v. *Wright*, 582 F.2d 20 (5th Cir. 1978) (monitoring expenditure of federal funds).

choices the employees must make or on the guidelines and standards by which those choices are constrained.[25] Drawing such dubious distinctions among various kinds of discretion therefore provides no assistance in identifying the situations in which immunity is appropriate. That approach also fails to recognize that the threat of personal liability will bias *any* discretionary decision in the direction of protecting the official's pocketbook, even though other, less personal, considerations may merit dominant consideration.

Some courts have relied upon the scope of the discretionary function exception contained in the Federal Tort Claims Act (see 28 U.S.C. 2680(a)) in concluding that immunity should be limited to acts of "policy" level discretion. See, *e.g.*, *Jackson* v. *Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc). As a threshold matter, reliance on the Federal Tort Claims Act to define the limits of personal immunity seems quite unsound. In addressing the appropriate limits upon *governmental* immunity for discretion-

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[25] In *Chavez* v. *Singer*, 698 F.2d 420 (10th Cir. 1983), for example, the court found that a fire captain was not entitled to immunity in an action brought by one of his subordinates for injuries he received when he followed the defendant's orders. The court noted that the defendant "had no policy making authority. Although he had operational control at a fire scene, he was required to follow established procedures. At most, his discretion was minimal." 698 F.2d at 422; see also *Franks* v. *Bolden*, 774 F.2d 1552 (11th Cir. 1985). We find no grounds for distinguishing this sort of supervisory autnority from the supervisory authority exercised in the personnel context, as to which the courts agree that federal employees are entitled to immunity. See also *General Electric Co.* v. *United States*, *supra* (upholding immunity claim in analogous circumstances).

ary acts, Congress had no reason to consider the impact of the threat of personal liability in distorting a decisionmaker's judgment. The effect of the threat of personal liability on individual decisions weighs in favor of according individual employees broader immunity than that available to a governmental entity. *Estate of Burks* v. *Ross*, 438 F.2d at 234; 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 29.14, at 717, 719-720 (1986); cf. *Owen* v. *City of Independence*, 445 U.S. 622, 653-656 & n.37 (1980).

In any event, the scope of the government's liability under the Federal Tort Claims Act, taken as a whole, supports a broad definition of discretion in the personal immunity context. In addition to adopting the discretionary function exception, Congress concluded that certain federal activities should be wholly immune from suit under state tort law,[26] and that violations of certain tort standards should not give rise to liability on the part of the United States.[27] Like the discretionary function exception, these provisions embody a determination that certain government conduct " 'should not be tested through the medium of a damage suit for tort.' " *Varig Airlines*, 467 U.S. at 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judi-*

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[26] See 28 U.S.C. 2680(b) (loss of postal material), 2680(c) (tax and duty assessment or collection; detention of goods by customs or law enforcement officer), 2680(e) (claims arising out of the Trading with the Enemy Act), 2680(f) (government-imposed quarantine), 2680(i) (fiscal operations of the Treasury and regulation of the monetary system), 2680(j) (combatant activities during time of war), 2680(k) (claims arising in foreign country).

[27] See 28 U.S.C. 2680(h) (intentional torts).

*ciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)); see note 18, *supra*.

A plaintiff should not be able to circumvent Congress's determination that the propriety of some federal actions should not be assessed by reference to state tort law by naming a federal employee as the defendant rather than the United States. Cf. *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). Because the federal activities covered by the exceptions are so varied, in order that federal employees engaged in those activities may be insulated against liability under state tort law, they must, at a minimum, be protected as to conduct fitting within the broad definition of discretion set forth in *Davis*.[28] That approach will protect the class of employees who might otherwise be encouraged to tailor their conduct to the requirements of state law by the threat of personal liability—those employees whose duties are not fully enumerated in explicit federal standards.[29]

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[28] Indeed, the areas of governmental activity excepted from coverage under the FTCA no doubt involve many mandatory duties involving no identifiable discretion. See note 26, *supra*. To the extent that is true, the legislative policy of excepting those areas of activity from judicial scrutiny will be furthered most effectively by a rule of absolute immunity for all actions within the scope of employment.

[29] Congress has enacted statutes substituting the United States as the defendant in suits against individual federal employees for injuries allegedly resulting from medical malpractice or negligent operation of a motor vehicle, committed in the course of the employee's official duties. See 10 U.S.C. (& Supp. III) 1089 (medical malpractice claims); 28 U.S.C. 2679 (claims asserted against drivers), 38 U.S.C. 4116 (medical malpractice claims); 42 U.S.C. 233 (same). The fact that

4. In defining the scope of government employees' immunity from personal liability for constitutional violations, this Court has recognized that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated" (*Davis* v. *Scherer*, 468 U.S. at 195).[30] Here too, immunity can insulate federal employees from the threat of litigation, and thereby promote "the effective functioning of government" (*Barr*, 360 U.S. at 573), only if employees know in advance that they will not be subject to tort liability for particular official acts. The types of conduct entitled to immunity therefore must be defined with clarity. See *Coleman* v. *Frantz*, 754 F.2d 719, 727-728 (7th Cir. 1985).

We are unable to formulate a definition of discretion narrower than that adopted by the Court in *Davis* that also provides the certainty necessary if the immunity is to have its intended effect. As we have shown, terms such as "policy" or "judgment" are too imprecise and thus are certain to be applied by courts in ways that will leave an employee wholly

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Congress has specifically addressed these two areas of recurrent liability is not dispositive as to the availability of immunity for less common instances of official conduct.

[30] Thus, the immunity standard adopted in *Harlow* protects federal employees from personal liability for constitutional violations unless an employee "could be expected to know that certain conduct would violate statutory or constitutional rights." 457 U.S. at 819; see also *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5 ("[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law").

unsure about his entitlement to immunity for a particular action or decision. Cf. *Varig Airlines*, 467 U.S. at 811 (noting difficulty in defining discretion under the Federal Tort Claims Act); *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d at 659 ("[t]here is no litmus paper test to distinguish acts of discretion"). This uncertainty itself will tend to defeat the purpose of the immunity and is reason enough to adopt a clearer and broader rule.[31]

### C. There Is No Persuasive Reason To Limit The Availability Of Official Immunity Where The State Tort Action Challenges Discretionary Conduct Within The Scope Of A Federal Employee's Official Duties

1. Denial of compensation for allegedly meritorious claims is, of course, a feature of every immunity rule. The Court has observed that official immunity requires consideration of the competing policies of "protection of the individual citizen against pecuniary

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[31] An additional factor weighing against an immunity test that focuses on the quantum of discretion exercised by the federal employee is that such a standard will more frequently be viewed as justifying substantial discovery. See, *e.g.*, *Heathcoat* v. *Potts*, 790 F.2d at 1543 ("detailed but abstract" job descriptions found insufficient to determine whether the defendants exercised discretion; court held that it was necessary to obtain a "fuller development of the facts" through discovery). The immunity rule accordingly will not protect officials against the burdens of litigation, a result contrary to the Court's recognition that an immunity standard should be formulated in a way that will "permit the resolution of many insubstantial claims on summary judgment" so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U.S. at 817-818; see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original) (official immunity serves as "an *immunity from suit* rather than a mere defense to liability").

damage caused by oppressive or malicious action" of government officials, and "protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits." *Barr* v. *Matteo*, 360 U.S. at 565 (plurality opinion); see also *Harlow* v. *Fitzgerald*, 457 U.S. at 807. However, the Court has never found the interest in deterring and remedying inappropriate governmental conduct sufficient to override the countervailing policies favoring immunity where immunity is demonstrably necessary to the effective functioning of government. Immunity is similarly appropriate here, in part because the remedial and deterrence interests are furthered in several ways notwithstanding the recognition of immunity.

First, a federal employee is only immune from liability for damage caused by acts that are "within the outer perimeter of [his] line of duty" (*Barr*, 360 U.S. at 575). The inquiry is whether the act has "more or less connection with the general matters committed by law to [the employee's] control or supervision," in which case it falls with the scope of his duties, or whether it is "manifestly or palpably beyond his authority." *Spalding* v. *Vilas*, 161 U.S. at 498; see also *Butz* v. *Economou*, 438 U.S. at 495; *Barr*, 360 U.S. at 573-574. The immunity rule thus may not be invoked to bar a tort action seeking damages for wholly unauthorized conduct by government employees. See, *e.g.*, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650-651 (1963); *Otto* v. *Heckler*, 781 F.2d 754, 757-758 (9th Cir. 1986); *Bates* v. *Clark*, 95 U.S. at 204; *Little* v. *Barreme*, 6 U.S. (2 Cranch) at 179; see also *Green* v. *James*, 473 F.2d 660 (9th Cir. 1973).

This limitation upon the scope of an employee's immunity assumes greater significance as the employ-

ee's discretion narrows. Cf. *Scheuer* v. *Rhodes*, 416 U.S. at 247 (observing that scope of immunity varies, "the variation being dependent upon the scope of discretion and responsibilities of the office[r] and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based"); *Barr*, 360 U.S. at 573 (plurality opinion). Thus, employees who exercise relatively less discretion will be entitled to immunity with respect to a narrower category of conduct.

Second, alternate avenues exist to deter wrongful conduct by federal employees. The government has general authority to take adverse action against an employee in order to "promote the efficiency of the service" (5 U.S.C. 7503(a), 7513(a)), and that authority is routinely invoked to suspend, demote, or discharge federal employees who have acted in a manner injurious to fellow employees or to the public. See, *e.g.*, *Brown* v. *Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983) (Border Patrol Agent suspended without pay pending trial on criminal charges relating to violations of civil rights); *Doyle* v. *Veterans Administration*, 667 F.2d 70 (Ct. Cl. 1981) (psychiatrist employed by Veterans Administration dismissed after he was found to have engaged in sexual misconduct with patients); *Johnson* v. *United States*, 628 F.2d 187 (D.C. Cir. 1980) (law enforcement officer discharged for improper use of his weapon); *Horney* v. *United States Forest Service*, 29 M.S.P.R. 543 (1985) (employee demoted for negligent testing of ignition device that resulted in fire on private land); *Harris* v. *United States Dep't of Justice*, 29 M.S.P.R. 332 (1985) (employee suspended for failing to follow accepted nursing practices in administering care to prisoners); *Watkins* v. *Department of the Navy*, 29 M.S.P.R. 146 (1985) (em-

ployee suspended for exposing himself and co-worker to excessive radiation); *Super* v. *Department of the Air Force*, 24 M.S.P.R. 221 (1984) (employee demoted for negligent performance of duties that resulted in possibility of serious damage to persons and property).[32]

Third, compensation for injuries caused by activities of the federal government is available, in many instances, through avenues other than a state law tort suit against a federal employee in his personal capacity. With respect to injuries incurred by a federal employee in the course of performing his official

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[32] See also *Lappin* v. *Department of Justice*, 24 M.S.P.R. 195 (1984) (employee removed from position as deputy United States Marshal because he performed his official duties in a manner that endangered the safety of others); *Poarch* v. *Department of the Navy*, 22 M.S.P.R. 34 (1984) (employee removed for making threats of bodily harm); *Riley* v. *Department of Agriculture*, 20 M.S.P.R. 32 (1984) (employee suspended and demoted for setting forest fire); *Randall* v. *Department of the Navy*, 18 M.S.P.R. 485, 486 (1983) (employee removed for reporting to duty while under the influence of alcohol; Board found that, because of the employee's duties, "his condition, if undetected, would have constituted a danger to himself and other employees"); *Connolly* v. *Department of Justice*, 18 M.S.P.R. 39 (1983) (employee removed for willfully committing false arrest); *Johnson* v. *Department of the Air Force*, 11 M.S.P.R. 239 (1982) (employee demoted from supervisory position because his actions did not comply with agency directives and created a danger to property and fellow employees); *Clark* v. *Department of the Navy*, 6 M.S.P.R. 24 (1981) (employees suspended for use of intoxicants while on duty); *Vick* v. *Department of the Navy*, 3 M.S.P.R. 364 (1980) (employee discharged for endangering the safety of a ship by improperly performing his duties); *Hardgrave* v. *Department of Interior*, 1 M.S.P.R. 267 (1979) (employee demoted because his poor driving had resulted in injuries to the public).

duties, Congress has adopted the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101. The FECA, which resembles state worker's compensation statutes, provides for administrative no-fault compensation when a federal employee incurs an injury on the job. The statute authorizes medical benefits, vocational rehabilitation and compensation for permanent disabilities (see 5 U.S.C. 8102-8115). Thus, the Department of the Army informs us that William Erwin was reimbursed under the FECA for his medical costs and received disability pay for the period that he was unable to work. He did not receive compensation for the alleged harm to his vocal chords because the FECA does not authorize compensation for that injury.[33]

Further, the Federal Tort Claims Act (FTCA) embodies the government's waiver of sovereign immunity with respect to tort claims generally.[34] While, as we have indicated (see pages 34-35, *supra*), the FTCA contains substantial explicit exceptions from

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[33] The FECA expressly precludes an employee who receives benefits under the statute from asserting any further claim against the United States (5 U.S.C. 8116). It does not address the right of an employee who receives benefits to assert a tort claim against his fellow employees, and several courts of appeals have concluded that the statute does not preclude such claims. *Heatcoat* v. *Potts*, 790 F.2d at 1543; *Bates* v. *Harp*, 573 F.2d 930, 934-936 (6th Cir. 1978); *Allman* v. *Hanley*, 302 F.2d 559, 563 (5th Cir. 1962). We do not argue that respondents' claims are precluded by statute. The availability of FECA benefits, however, goes some distance toward defeating any argument that a narrowed concept of immunity is necessary to assure that the injured party's interest in compensation and deterrence is properly served.

[34] The Suits in Admiralty Act contains a similar waiver of sovereign immunity with respect to maritime tort claims against the United States (see 46 U.S.C. 742).

its coverage, neither the discretionary function exception nor all of the exceptions taken together are as broad as the immunity properly available to an individual defendant. Where a federal employee's immunity from personal liability extends beyond the FTCA's statutory exceptions, compensation *is* available through an action against the United States under the Tort Claims Act. See *Sami* v. *United States*, 617 F.2d 755, 772 (D.C. Cir. 1979).

Fourth, from a practical perspective, it is unlikely that a broad definition of discretion, leading to a broadened application of individual immunity, will appreciably reduce an injured person's ability to obtain compensation. The limited financial resources of many employees who exercise the more modest sort of discretion which *Davis* recognized as a sufficient basis for immunity, suggests that plaintiffs will rarely lose genuine opportunities for compensation. See *Sami* v. *United States*, 617 F.2d at 772 & n.30.

In sum, as the plurality stated in *Barr*, while "there may be occasional instances of actual injustice which will go unredressed, * * * we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576). The Court therefore should not limit the scope of immunity in order to protect the right to compensation for wrongful government action.

2. Some judges and commentators have intimated that the immunity standard applied by this Court in *Barr* is unsound because it confers an immunity broader than that available to federal employees for

constitutional violations. See, *e.g.*, *Granger* v. *Marek*, 583 F.2d 781, 786-787 (6th Cir. 1978) (Merritt, J., dissenting); 5 K. Davis, *Administrative Law Treatise* § 27:22, at 116-117 (2d ed. 1984). This criticism appears to rest on the fact that the employee loses his immunity in the constitutional tort context if he is shown to have violated a clearly established constitutional right. We believe that this additional requirement for immunity for constitutional wrongs is explained by two important differences between constitutional violations and infringements of state tort standards. First, especially with respect to the official actions of federal employees, rights guaranteed under the federal Constitution are entitled to greater protection than those arising under state tort law. See *Butz* v. *Economou*, 438 U.S. at 495. Second, as the Court suggested in *Butz*, where a federal employee fails to comply with a clear constitutional rule, he has also acted in a manner that is outside the scope of his official duties. See note 36, *infra*. Thus, the scope of employment requirement inherent in the *Barr* immunity test is the appropriate analog to *Harlow*'s clearly established constitutional right test. There is accordingly no basis for further qualifying the availability of immunity in the state law context.

This conclusion is supported by the unworkability of the supplemental provision that would have to be added to the *Barr* test to parallel the *Harlow* rule that an official is divested of immunity in the constitutional context if he violates a "clearly established statutory or constitutional right[] of which a reasonable person would have known" (457 U.S. at 818). Under *Harlow*, one looks to the clearly established character of the constitutional right that is the subject of the action, so in the state tort context

the inquiry presumably would look to the clarity and established character of the state law right at issue. Given the involvement of a federal employee, however, the inquiry would necessarily be more complex. Regardless of the clarity of a given violation as a matter of state law, a federal employee must view any state law duties through an overlay of federal law obligations. Thus, the employee could be deprived of immunity only where he (1) should have known he was violating a state law duty, and (2) should have known that his affirmative obligations under federal law incorporated that state law rule. See pages 27-30, *supra*.

This inquiry is, at best, an uncertain one. It is no easy matter for judges and lawyers to evaluate the interplay of state tort law and federal law relating to the performance of governmental functions. Because federal law is generally supreme, there is usually no basis for liability in any event. See note 19, *supra*. To the extent that courts find otherwise in specific cases, it will nonetheless be very difficult to conclude that such a result should have been known in advance to a non-lawyer, federal employee. We think that it will almost never be the case that a federal employee performing a discretionary function within the scope of his employment will violate state law duties that he should have known were binding on him in the course of the execution of his official responsibilities.

Moreover, when faced with this issue in divergent fact situations, courts would predictably reach unpredictable results. Insofar as they would find liability they would, in most instances, undercut the purpose of immunity by creating uncertainty for others. Such uncertainty cannot be justified given the very few if any instances where a clear violation of inter-

locking state and federal provisions might properly be found. All things considered, the project is not worth the candle. Finally, such a mixing together of federal and state standards and remedies is inappropriate. By allowing the state tort law action to go forward only where the conduct clearly violates a separate, federal legal standard or a state standard incorporated into federal law, the state tort law remedy essentially becomes a private right of action for violations of federal provisions which themselves embody no action for damages. Remedies for federal law violations are thus implied by a chain of reasoning which bears no resemblance in logic or result to this Court's established approach to the recognition of implied rights of action. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

The Court considered an analogous situation in *Davis* v. *Scherer*, *supra*. The plaintiff in that case argued that the defendants' failure to comply with a state regulation was sufficient to vitiate their immunity from liability for a constitutional violation. The Court rejected that argument, holding that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision" (468 U.S. at 194). The Court further stated that "officials sued for violations of rights conferred by a statute or regulation * * * do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages" (*id.* at 194 n.12 (emphasis in original)).[35]

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[35] Another alternative qualified immunity rule is the pre-*Spalding* rule under which a federal employee lost his im-

In sum, we submit that the *Barr* rule, requiring that the employee act within the scope of employment, is the proper analog in the state tort law context to the *Harlow* immunity standard for constitutional torts. There is neither a sound reason to impose any "clearly established law" requirement in the context of an action under state law, nor any practicable way in which to do so.[36]

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munity if the plaintiff could show that the federal employee had acted with malice. See *Barr*, 360 U.S. at 586-588 (Brennan, J., dissenting); see also pages 16-17, *supra*. Such an approach might arguably have been justified at the time of this Court's decision in *Butz* v. *Economou*, *supra*, under which a federal employee lost his immunity if he was shown to have acted in subjective bad faith—*i.e.*, with malice. And should the Court reject the general thrust of our argument, we believe that immunity from actions alleging mere negligence should be allowed, and could be implemented by imposition of an absence-of-malice requirement. See note 11, *supra*.

In general, however, it appears that the basis for such a requirement was eliminated by this Court's decision in *Harlow* v. *Fitzgerald*, *supra*, which deleted the subjective portion of the *Butz* immunity standard, stating that "[t]here are special costs to 'subjective' inquiries of this kind. * * * "Judicial inquiry into subjective motivation * * * may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." The Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 816-818 (footnotes omitted)). A state-of-mind-based immunity rule in the state tort law context would raise the very problems that led the *Harlow* Court to reject such a rule, and is thus precluded by that decision.

[36] This conclusion is supported by the Court's opinion in *Butz*, which justified adoption of a qualified immunity rule for constitutional violations by observing that "if [federal em-

**D. Petitioners Are Immune From Liability Under State Law**

In rejecting petitioners' immunity defense, the court of appeals found "a material question" as to whether petitioners' acts were sufficiently discretionary to entitle petitioners to immunity (Pet. App. 3a). Although the court of appeals did not, in this case, discuss at length the content of the discretion requirement, it has subsequently stated that acts involving "planning or policy consideration[s]" are sufficiently discretionary to warrant immunity, while acts involving "day to day operations" are not (*Heathcoat* v. *Potts*, 790 F.2d at 1542).

The court of appeals thus applied the wrong standard in this case. Moreover, there is no question that petitioners exercised sufficient discretion to trigger immunity under the *Davis* standard. The complaint alleges that the soda ash was improperly stored, that William Erwin should have been warned regarding the presence of the soda ash, and that the soda ash was improperly bagged. These actions typically involve the exercise of discretion. See *Dalehite* v. *United States*, 346 U.S. 15, 38-44 (1953) (holding that the United States was not subject to tort liability in connection with similar determinations regarding the storage of chemicals because those determinations

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ployees] are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability." 438 U.S. at 495; see also *id.* at 493-494. The Court thus suggested that *Barr*'s scope of official duty requirement filled the role, in the state tort context, of the rule vitiating immunity from constitutional liability where an employee violates a clearly established constitutional right.

fell within the discretionary function exception to the Tort Claims Act).

Indeed, respondents' factual allegations, upon which the court of appeals relied in finding a disputed question of material fact, were that petitioners "are not involved in any policy-making work for the United States Government," that petitioners' duties required them "to follow established procedures and guidelines," and that petitioners "work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit 2). Respondents thus implicitly acknowledge that petitioners exercised "operational" discretion with respect to the conduct challenged in the complaint, and contend only that petitioners were not engaged in policymaking. Because petitioners are not charged with exceeding the outer perimeter of their discretionary authority, they are certainly entitled to immunity.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 86-714

# In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL.,
*Petitioners*

v.

WILLIAM T. ERWIN, SR., and EMELY ERWIN,
*Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Respondents are satisfied with petitioners statement of the question.

## PARTIES TO THE PROCEEDING

Respondents are satisfied with petitioners listing of "Parties to the Proceeding".

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-714

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RODNEY P. WESTFALL, ET AL.,
*Petitioners*

v.

WILLIAM T. ERWIN, SR., and EMELY ERWIN,
*Respondents*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS

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### STATEMENT

Respondents are satisfied with the "Statement" of petitioners and adopts same by reference.

## SUMMARY OF ARGUMENT

This action was brought under Alabama State Law, §25-5-11, Code of Alabama, 1975, to recover damages from supervisory employees for personal injuries to the plaintiff, and a derivative suit by the wife, for failure to adequately warn, store, or deliver caustic soda ash at an Army facility. This Court, in *Barr v. Matteo*, 360 U.S. 564 (1959) and subsequently in *Doe v. McMillan*, 412 U.S. 306 (1973) has established a two-prong test in order to invoke governmental immunity for governmental employees sued as a consequence of their activities. Only if the challenged conduct is a discretionary act, and is within the outer perimeter of the employee's line of duty, should immunity attach. The mere fact that all activities involve some discretion does not provide the requisite proof so as to provide immunity. To hold otherwise, would establish, as a matter of law, absolute immunity from common law and state law causes of action against employees of the government. Only if the acts involve planning or policy considerations and do not concern day-to-day operations, should the acts be classified as discretionary so as to provide a potential for immunity.

This Court's decisions have, since this issue was first addressed, provided protection from suit in circumstances where it is necessary to avoid the disruption of federal governmental functions, and, have consistently refused to extend the discretion where the contributions of immunity to effective government do not out-weigh the recurring potential harm to individual citizens. To establish a classification of immunity wherein a "modicum" of discretion is all that is necessary, when coupled with an activity within the outer perimeters of the job, to establish immunity would circumvent, if not destroy, the functional test that has been applied consistently since *Barr*, in determining the appropriateness of immunity. There is no activity that does not have a "modicum" of discretion. This Court, and the interpretations of this Court, have always held that if the function involved the orderly conduct of government, and the decision making process involves discretion to ac-

complish those means, then immunity should attach, and if not, it should not.

Petitioners herein, asks for a change in the law to in essence establish absolute immunity for all government employees under all circumstances. As this Court has recognized, there has been no good reason for such a broad interpretation in establishing governmental immunity and certainly petitioners herein have not shown the need for change.

Federal employees, if acting within the outer perimeters of their authority, and exercising discretionary functions that involve planning or policy considerations but do not concern day-to-day operations under the cases, are entitled to immunity. If either of the tests are not met, then they are not entitled to immunity. The Court of Appeals correctly held that there was a material question as to whether or not the complained of acts by the petitioners herein were discretionary, thus reversing the district court's grant of summary judgment. Such holding by the Court of Appeals was the correct holding and should be affirmed.

## ARGUMENT

### PETITIONERS ARE NOT ENTITLED TO IMMUNITY FOR PERSONAL LIABILITY FOR INJURIES CAUSED BY THEIR CONDUCT WHEN SUCH CONDUCT ARISES OUT OF DAY-TO-DAY OPERATIONS AND DOES NOT INVOLVE PLANNING OR POLICY CONSIDERATIONS.

The petitioners herein, have consistently argued and would have this Court hold that virtually all government employees acting *within the line and scope of their duties*, not withstanding whether those duties involved discretionary decision-making activities, or only involved operational, ministerial activities, should, under the previous holdings of this Court, be absolutely immune from tort liability. Petitioners, however, have apparently recognized the two-prong approach of definition of duties, to-wit: that the activities of the government employees were within the outer perimeters of their duties, and that in carrying out their duties they were exercising discretionary functions. The use of the term "discretionary function" in the context of day-to-day operations, is so ambiguous so as to make succinct definition of same impossible. Therefore, their argument is that since all activities involve some discretion, all activities, though operational in nature, should be considered discretionary so that immunity applies.[1]

The petitioners base the aforesaid argument on this Court's seminal decision on this issue, *Barr v. Matteo*, 360 U.S. 564 (1959). The petitioners interpretation of *Barr* can be supported only upon the most superficial analysis of *Barr*

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[1]Respondents do not assert, nor have they ever asserted, that petitioners were not acting within the outer perimeters of their duties, which, upon proof, would in and of itself defeat immunity if those activities involved governing. To the contrary, it is conceded that these petitioners were indeed acting within the "outer perimeters" of their authorities, but, that the activities in which they were engaged were ministerial and/or operational, and not "discretionary" within this Court's previous definitions of discretion, so that direct actions against them for negligent conduct would not effect the orderly administration of government.

resulting in an unreasoned and overly broad application of its tenants. Careful probing into and consideration of the policy sought to be advanced by *Barr,* reveals plainly that reliance upon the immunity doctrine in not proper under the facts of this case, nor was it the intent of this Court to in fact immunize Government Employees, though acting in the outer perimeter of their authorities, with any activity that involved the most minute discretion. The Eleventh Circuit, thus correctly rejected the immunity defense as a bar to this action.

The facts and holding of *Barr* are well known. The defendant in that case was the Acting Director of the Office of Rent Stablization. He was sued by two subordinate employees who alleged that he had libeled them in a press release made by the defendant, dealing with his suspension of the two employees. The defense was absolute executive immunity. In the plurality opinion, this Court expanded the scope of *Spalding v. Vilas,* 161 U.S. 483 (1896), holding that the immunity doctrine indeed did preclude liability for *libel* by the defendant *Barr.*[2]

Clearly expressed, both in the letter and spirit by this passage by Justice Hand, is concern for protection of the need of government to make and execute choices between

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[2] The Court, through Justice Harlan, reasoned as follows: "The reasons for the recognition of the privilege has been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: 'it does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to

conflicting policies, which, of necessity, impacts upon the interests of private citizens. At the very core of the concept of government is the obligation to select and promote certain social values over others, whether on the grand scale of national government or on the local, provincial scale of a small town council. Government is a delicate balance among competing interests. Thus, at the core of the concept of government is the need to make judgments, exercise discretion, and otherwise act without the aid of clear, unambiguous, or unqualified guidelines.

*Barr* was concerned not only with the direct policy-making function of government, but also the discretionary executive of policy. Policies adopted by government are broad statements of principle, often providing only vague guidelines for application to particular factual circumstances. The need to execute the policy under *every* set of facts necessarily requires that executive officers interpret policy and make judgments about the properiety and extent to which a given governmental policy applies to a given set of circumstances. The use of discretion and judgment by *executive* officers is governmental in as much sense as the formation of policy. The Court in *Barr* obviously feared that executive officers, who were required to use their vaguely guided discretion and judgment to carry out policy, would be deterred from doing so if faced with being sued for executive governmental policy.[3]

However, *Barr* also recognized the unavailability of absolute immunity in all circumstances. "It is not the title of his

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be founded on a mistake, in the fact of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . ." *Barr v. Matteo*, 360 U.S. 571-2.

[3]Such suits, the Court feared, would "inhibit the fearless, vigorous, and effective administration of policies of government". *Barr*, at 571.

office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision', *Spalding v. Vilas, supra.* (161 U.S. at 498) which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. *Barr,* at 573-4.

Progeny of *Barr,* clearly enounced the limited scope and intent of this Court. *Doe v. McMillan,* 412 U.S. 306 (1973), a case which centered in part on the scope of the Speech and Debate Clause in relation to the immunity of members of Congress and their aides, nevertheless, involved the *Barr*-type immunity as related to the Superintendent of Documents and the Public Printer. Congress had conducted an investigation into the quality of education in the District of Columbia school system and, after its completion, printed a report that revealed certain test scores of the plaintiffs. The report was printed and distributed to the public by the Public Printer and Superintendent of Documents, respectively. The plaintiffs sued members of Congress, their staff aides, and the Public Printer and Superintendent of Documents for defamation. After disposing of the claims against the members of Congress and their aides,[4] this Court turned to the asserted executive immunity of the remaining defendants.

Beginning with the discussion of *Barr v. Matteo, supra,* the Court first emphasized that "the immunity conferred might not be the same for all officials for all purposes" (*Doe,* at 319). The scope of that immunity necessarily bears a relationship to the authority of the officer and the context in which he acts.[5]

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[4] *Doe v. McMillan,* 412 U.S. 306, 317-18 (1973).

[5] The *Doe* Court explained: "Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents — the Public Printer and the Superintendent of Documents — should be accorded absolute immunity in this case. *Id.* at 320.

The *Doe* Court, in delineating "the functions and duties" of the defendants[6] held the fact that the defendants were acting within the "outer perimeter" of their duties was *not* enough in and of itself to invoke the immunity doctrine. The policy underlying the doctrine is the desire to free the *discretionary* judgments of executive officials from questioning by suit. The claim to the immunity defense by the governmental employees in *Doe* failed, the Court wrote, because of the absence of discretionary authority invested in the defendants;[7] the Public Printer and Superintendent of Documents were required to print and distribute whatever documents were properly presented to them by other agencies of the government. By this reasoning, the Court reversed the grant of immunity to those defendants by the lower courts.

The key importance of *Doe, supra,* lies in the analysis of discretion as a critical factor in the legitimacy of the executive immunity. Plainly stated in *Barr* was the policy decision supporting the immunity: fear that suits would deter executive officials from exercising discretion to carry out the "fearless, vigorous, and effective *administration* of policies of government". *Id.,* at 571 (emphasis supplied). The *Doe* Court, in applying *Barr,* realized the discretion involved in the acts of the administration of the policies of government. The discretion exercised by the Public Printer and the Superintendent of Documents was something other than "governmental". Although this Court did not characterize that "discretion" as "ministerial", as have other courts following *Doe*[8], it did plainly hold that that type of discretion was not the type sought to be protected by the immunity doctrine.

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[6]By analyzing the functions and duties of the defendants, this Court gave rise to the "functional analysis" later used by various circuit courts of appeals. *see Stepanian v. Addis,* 699 F.2d 1046 (11th Cir. 1983).

[7]The Court stated "(t)he Public Printer and the Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly." *Doe,* at 323.

[8]See, e.g., *Johnson v. Alldredge,* 488 F.2d 820 (3rd Cir. 1973); *Henderson v. Bluemink,* 511 F.2d 399 (D.C. Cir. 1974); *Davis v. Knud-Hansen Memorial Hospital,*

Based on the guidance provided by this Court in *Barr, supra,* and *Doe, supra,* the lower Federal Courts, both on the circuit and district levels, have struggled to fashion a principled, consistent doctrine of executive immunity. By and large, the courts have agreed that the immunity doctrine entails two crucial elements: first, that the federal official act within the "outer perimeter" of his authority and, second, that he be performing a "discretionary function".[9] The test developed by these cases is best stated as follows:

> *Barr* also makes clear that executive officials are not automatically immune from all damage suits. Both the plurality and Justice Black's concurring opinion follow the previously established law regarding executive immunity, requiring that two criteria be met before such immunity is found. First, as *Barr* makes clear, immunity protects officials from liability only for actions having a policy-making or judgmental element. This requirement has sometimes been phrased as permitting officials to enjoy immunity from liability for the exercise of "discretionary" but not "ministerial" functions. It reflects the purpose for which immunity is granted to executive, as well as judicial and legislative officers: to ensure that important decisions are made free from the fear of personal liability or harassing suits.
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> The second requirement, also noted in *Barr,* is that the alleged wrongful acts must have been "within the outer perimeter" of the defendant-official's duties.
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> (*Johnson v. Alldredge,* 488 F.2d 820, 824 (3rd Cir. 1973).

The Fifth Circuit additionally applied the same interpre-

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635 F.2d 179 (3rd Cir. 1980); *Queen v. Tennessee Valley Authority,* 689 F.2d 80 (6th Cir. 1982); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983). See also, *Spencer v. General Hospital of District of Columbia,* 425 F.2d 479 (D.C. Cir. 1969) and *Estate of Burks v. Ross,* 438 F.2d 230 (6th Cir. 1971), which pre-dated *Doe v. McMillan,* 412 U.S. 306 (1973), but which anticipated the restrictive holding in *Doe.*

[9] *Estate of Burks v. Ross,* 438 F.2d 230 (6th Cir. 1971); *Johnson v. Alldredge,* 488 F.2d 820 (3rd Cir. 1973); *Berberian v. Gibney,* 514 F.2d 790 (1st Cir. 1975); *George v. Kay,* 632 F.2d 1103 (4th Cir. 1980); *Newkirk v. Allen,* 522 F. Supp. 8 (S.D.N.Y. 1982); *Chavez v. Singer,* 698 F.2d 420 (10th Cir. 1983); *Gray v. Bell,* 712 F.2d 490, 505 (D.C. Cir. 1983); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983); *Stepanian v. Addis,* 699 F.2d 1046 (11th Cir. 1983); *Spencer v. New Orleans Levee Board,* 737 F.2d 435 (5th Cir. 1984); *Williams v. Collins,* 728 F.2d 721 (5th Cir. 1984); *Franks v. Bolden,* 774 F.2d 1552 (11th Cir. 1985); *Johns v. Pettibone Corp.,* 769 F.2d 724 (11th Cir. 1985).

tation of *Barr* in *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), wherein Judge Rives anticipated this Court's holding in *Doe, supra.* In *Norton*, the Circuit Court was presented with a case in which several members of the Justice Department had been sued for false arrest by three men arrested following riots at the University of Mississippi upon the enrollment of James Meredith as a student. In analyzing the *Barr* reasoning, Judge Rives first recognized the requirement that the defendant act within the "outer perimeter" of his authority in order to obtain immunity. He also emphasized that allegations of malice or concerning the rank of the official do not affect the availability of the defense. The basic premise and question to be addressed in order to obtain immunity, is whether or not the act of the official about which complaint is made, was a judgment or decision which it is necessary that the government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability.[10]

Other circuits have discussed this balancing test wherein, absent either of the two standards, the "outer perimeter" of authority, and a "discretionary action", immunity fails. In *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977),[11] the balancing test was applied. The purpose of the balancing analysis is to go directly to the heart of the policy underlying the establishment of executive immunity. Immunity is justified under the rationale of *Barr, supra*, only in those instances in

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[10]"There is another limiting factor — the nature of the duties. It is often said that the officer must be performing a 'discretionary function'. In *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, (2nd Cir. 1962), *cert. denied*, 374 U.S. 827, 83 S. Ct. 1862, 10 L. Ed. 2d 1050 (1962), Judge Medina explained what this requirement actually means: 'There is no litmus paper test to distinguish acts of discretion * *, and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning, the determination of the real question — is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability". (*Norton v. McShane*, 332 F.2d 855, 859 (5th Cir. 1964).

[11]"We read *Doe v. McMillan, supra*, as requiring us to balance the consideration of harm to the individual citizen with the threat to effective government in the context of this case before granting or refusing to grant defendant official immunity." (*Jackson v. Kelly*, 557 F.2d 535, 539 (10th Cir. 1977).

which the need to protect the effective administration of government outweighs the threat of harm to individual citizens. Conversely, where the availability of a remedy for harm to citizens has little or no impact on the operation of government, the defense of immunity would work a cruel tragedy without furthering any legitimate, larger interests. The *Jackson* Court, *supra*, finding that the allowance of a medical malpractice claim "would not tend to constrict government functioning in an area where prompt government judgments are essential", (*Id.*, at 739) held that the harm to citizens, namely physical injury or death, outweighed the need to protect those particular acts in question.

The issue then becomes whether or not certain activities can reasonably be defined as ministerial-operational, so as to preclude immunity, or do all activities involve some discretion so as to necessitate immunity based on the need for orderly governance. The Federal Torts Claims Act (FTCA) has traditionally construed activities as being discretionary or ministerial, so as to allow protection in those instances where governing would be effected in the absence of immunity. The Eighth Circuit, in the case of *Aslakson, et al. v. United States of America*, 790 F.2d 688 (8th Cir. 1986), (distinguishing *United States v. S.A. Empresa de Viacao Aerca Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) ), held in a Federal Tort Claims Act case government employees should not be immune when they fail to comply with regulations or policies designed to guide their actions in a particular situation though they may have had some discretion in the manners in which they conducted themselves. Further, in another FTCA action, *Drake Towing Company, Inc. v. Meisner Marine Construction Corp.*, 765 F.2d 1060 (11th Cir. 1985) the Eleventh Circuit held, contrary to the argument espoused by petitioners herein, that it was insufficient for the government to merely show there was some decision making involved in the activities undertaken.[12]

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[12]"For the government to show merely that some choice was involved in a decision-making process is insufficient to activate the discretionary function

The interpretation of both *Barr, supra,* and *Doe, supra,* by the Eleventh Circuit in *Franks v. Bolden,* 774 F.2d 1552 (11th Cir. 1985) directly sets out the two-prong test of immunity, and its application in weighing the contributions of immunity to effective government versus the recurring harm to an individual citizen.[13]

> "Although there is no 'ready-made' answer as to whether a defendant is entitled to immunity, the Supreme Court has indicated immunity is available to Federal employees exercising discretionary functions and acting within the outer perimeters of their duties. See *Doe,* at 322-23, 93 S. Ct. at 2029-30; *Barr,* 360 U.S. at 574-75, 79 S. Ct. at 1341; *Johns v. Pettibone Corp.,* 769 F.2d 724, 727 (11th Cir. 1985). 'We have recently noted, however, that not every act which might literally be termed 'discretionary' is sufficient to evoke the immunity doctrine. Indeed '[i]n the strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion'. *Pettibone,* 769 F.2d at 728 (quoting *Swanson v. United States,* 229 F. Supp. 217, 219-20 (N.D. Cal. 1964) ). To prevent the discretionary function requirement from being rendered meaningless, we have held that official immunity may be extended only to those acts of federal employees involving planning or policy considerations. See *Pettibone,* 769 F.2d at 728-29; *Alabama Electric Co-Operative, Inc. v. United States of America,* 769 F.2d 1523, 1525-28 (11th Cir. 1985). Where on the other hand, if the acts in question concern day-to-day operations, official immunity is not available."

*Franks v. Bolden,* 774 F.2d 1552, 1555 (11th Cir. 1985).

It is recognized that the immunity of government employees from personal liability under the official immunity doctrine is much broader than the immunity of the government itself, and that government employees are

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exception. The balancing of policy considerations is a necessary prerequisite." *Drake Towing Company, Inc. v. Meisner Marine Construction, Corp.,* 765 F.2d 1060, 1064, (11th Cir. 1985).

[13]"The application of the official immunity doctrine in a particular case depends on 'a discerning inquiry into whether the contribution of immunity to effective government. . . outweigh the perhaps recurring harm to the individual citizen' ". *Franks, supra,* (quoting *Doe v. McMillan,* 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed. 2d 912 (1973) ).

immune in many cases where the government may not be, because of differing policies behind the two immunities. Nevertheless, there continues to be the distinction between activities of the employee applying to governance, (i.e. establishing the policy of government) and those that are related solely to day-to-day operations in administering the policies and activities of government.

The policy lying at the very heart of the decision of *Barr v. Matteo, supra,* is the preceived need to protect the discretion used by federal executive officials, not only in the formation of policy, but also in the "fearless, vigorous, and effective administration of policies of government". *Barr,* at 571. Although certainly the execution of policy is something different from the formulation of policy, the discretion involved is nevertheless governmental. Policies formulated by government, almost always and of necessity, are broad guidelines for conduct, stated with vagueness and ambiguity inherent in the broadness. In applying such policies, executive officials must exercise judgment and discretion to make policy respond to the specific circumstances of narrow factual situations. Also, the degree of discretion necessarily entrusted to executive officers is in direct relation to the officer's position to the hierarchy of authority.[14]

At the top of the chain of authority, the executive officer must exercise a great deal of discretion because he is faced with a broader spectrum of divergent situations. The lower the officer in the hierarchy, however, the less discretion he needs to function; this is simply because the lower in the hierarchy, the less divergent situations the officer must face and the more specific are the instructions he has received from superiors. Tasks become more routine, less unique in the lower levels of any scheme of authority. Further, as a consequence of the trickle process, rules and regulations with which he is expected to act and guidelines for the performance of his activity have been established. Addi-

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[14] This Court, in *Barr,* and *Doe,* confirmed that "the immunity conferred might not be the same for all officials for all purposes". *Barr, supra,* at 573-4; *Doe, supra,* at 319.

tionally, as a consequence of his duty, he must carry out those activities in such a manner, under all laws, so as to not injure his fellow man. Indeed, at the lowest levels, there is little if any discretion, as the instructions and regulations guiding conduct in the lowest levels become very focused, and very specific. By reference to the lowest levels, however, one cannot necessarily assume that line employees are the only individuals of government who should not be entitled to immunity. As has previously been stated, the litmus test is whether or not the activities involve planning or policy considerations and as such, in the event there is immunity, does it out-weigh the perhaps recurring harm to the individual citizen. Contrary to the assertions of the petitioners, there has been consistency in applying these tests. Granted, the mere availability of suit does cause some hardship and disruption; however, when weighed against the perhaps recurring harm to individual citizens, an objective guideline can be established which has been applied to this point in time in a relatively consistent manner by the circuit courts interpreting the opinions of this Court.

It must be remembered that this Court, by fashioning the "executive immunity" doctrine, in *Barr, supra,* viewed that privilege as an "expression of policy designed to aid in the effective functioning of government". (*Id.* at 572-3). Consistent with that policy, the category of discretion most in need of the privilege is that discretion characteristic of the "functioning of government", as distinct from routine, common-place judgments. In the largest sense of the word, indeed, everything done by every federal employee is governmental. That does not, however, answer the question whether every act of every federal employee which involves some quality that can be termed discretionary, should be shielded by immunity. To state so broad a rule would effectively immunize every federal executive officer, agent, and employee. Such a result would be clearly contrary to this Court's instructions in *Doe, supra,* where it was cautioned that there was no fixed, invariable rule of executive immunity, but that one ought to weigh the need to protect *some* discretion against the need to remedy harms to

citizens.[15] Discretion shielded by the privilege must be such that its contribution to "effective government" is more important in the larger scheme of things than the need to remedy harms done to individuals. The discretion involved must be worthy of being called "governmental", more than the mere shallow, routine, or trival.[16]

The circuits have wrestled with the problems of limiting the privilege to those acts of discretion most deserving and most critical to the administration of government. In *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), the Court of Appeals, while emphasizing the death of the "government-proprietary" distinction, recognized a new test founded on the distinction between "governmental" acts and "ministerial" acts.[17]

A previous case, *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971) did grant immunity to doctors while nurses were not granted immunity. This holding was soundly criticized and rejected in *Henderson, supra.* Nevertheless, the test remains the same throughout the cases. The key is the functional analysis of the conduct of the defendant. If the conduct is such that there are recognized standards, precise instructions, or mandatory duties for its performance, it cannot be properly characterized as the type of discretion sheltered by the immunity doctrine. That functional analysis of *Doe, supra,* was, is, and should be, sufficient for determining under what circumstances immunity should apply. Its object is to seek to find out whether or not the acts of the official are governmental in nature, or operational, so that they come within mandatory duties, standards, or

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[15]*Doe, supra,* at 320.

[16]*See Norton v. McShane,* 332 F.2d 855, (5th Cir. 1964), quoting *Ove Gustavvson Contracting Co. v. Floete,* 299 F.2d 655 (2nd Cir. 1962), *cert. denied,* 374 U.S. 827, 83 S. Ct. 1862 10 L.Ed. 2d 1050 (1963); *Spencer v. New Orleans Levee Board,* 737 F.2d 435, 437 (5th Cir. 1984).

[17]Holding that the Army doctor was not immune from malpractice liability, the court reasoned: "To be sure, the acts complained of involved the exercise of discretion in the normal usage of that term but the significant factor is that the discretion exercised might have been medical rather than governmental. The chief policy underlying the creation of immunity for lower governmental officials

orders, that can be readily ascertained. All activities of government cannot be those "where the concept of duty encompasses the sound discretionary authority". *Barr, supra,* at 575. No clearer statement could be found that not all decisions for acts of discretion by government employees are immune, but only those critical to the effective administration of policy.

The policy decisions related to immunity are the same now as they were when this Court decided *Barr, supra,* and *Doe, supra.* The Court correctly decided that in order for there to be an orderly process of governing, under certain circumstances, those in whose trust the cloak of governing has been bestowed, should be cloaked with immunity, so as to o provide unfettered discretion for the best of all. Also, this Court recognized that certain other activities of government employees are not so related to the activity of governing so as to out-weigh the right of the individual to pursue remedies that do not effect governing. In such circumstances where the activities did not arise out of discretionary functions related to the carrying on of government, there would be no distinction in the immunities provided a government employee than any other in society. Though petitioners herein argue that private enterprise does provide "compensation" commensurate with the risks attached to the position of the employee, and the government, does not, to the contrary, many agencies of government, such as TVA, do provide for payment of judgments against their employees in suits brought against the em-

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is mainly that which stems from the desire to discourage [sic — encourage?] 'the fearless, vigorous, and effective administration of policies of government'. However, that policy is not applicable to the exercise of normal medical discretion since doctors making judgments would face the same liability outside of government service as they would if the complaint below is upheld. *A fortiori,* the threat of liability for negligence would not deter the fearless exercise of medical discretion within government service any more than the same threat deters the exercise of medical discretion outside of government." *Henderson v. Bluemink,* 511 F.2d 399, 402-3 (D.C. Cir. 1974); see also *Jackson v. Kelly,* 557 F.2d 735 (10th Cir. 1977); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983); *Burchfield v. Regents of the University of Colorado,* 516 F. Supp. 1301 (D. Colo. 1981).

ployees arising out of and in the course of, their employment. This Court has recognized, and its rule has been applied, that there should be no distinction in our society between wrongs committed by a non-governmental employee and a government employee, so long as those wrongs do not arise out of a function that, does effect governing, notwithstanding the fact the wrong may involve a "modicum" of discretion.

As applied to the facts in this case, and contrary to the position of petitioners, and consistent with the prior holding of the Eleventh Circuit in *Heathcoat v. Potts,* 790 F.2d 1540 (11th Cir. 1986) and *Johns v. Pettibone Corp.,* 769 F.2d 724 (11th Cir. 1985) there are issues of material fact as to whether the activities of the petitioners herein were operational in nature or discretionary. Applying the two-prong test, and admitting the activities of the petitioners were within the outer perimeters of their authority, it cannot be said, based on the law as applied to the particular functions of these petitioners, that immunity attaches. As was said by the Eleventh Circuit, every action of a government employee except perhaps a conditioned reflex action involves the use of some degree of discretion.[18] To cloak each and every government employee with immunity in any activity in which he is involved, defeats the specific tenants of *Barr, supra,* and *Doe, supra,* all at the expense of the injured party.

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[18]*Johns v. Pettibone,* 769 F.2d 724, 728 (11th Cir. 1985).

## CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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July 1987

No. 86-714

# In the Supreme Court of the United States

OCTOBER TERM, 1987

RODNEY P. WESTFALL, ET AL., PETITIONERS

*v.*

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

Respondents' answering brief demonstrates that the parties to this case share a number of common premises. There is agreement that federal common law governs the immunity to be accorded a federal employee sued on a state law tort theory. There is further agreement (Resp. Br. 5, 9, 12-13) that the question presented implicates the absolute immunity doctrine set forth in *Barr* v. *Matteo*, 360 U.S. 564 (1959), rather than the qualified immunity rule developed in the constitutional tort context (see *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)),[1] and that the

[1] The District of Columbia Circuit previously found an inconsistency between *Barr* and *Harlow*, and expressed some doubt about the propriety of the absolute immunity rule set forth in *Barr* (see *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1428 n.11 (D.C. Cir. 1987)). That court recently recognized that the two rules may be reconciled, however, and indicated that the absolute immunity rule set forth in *Barr* is justified by the strong federal interest in preventing state interference with the functioning of the federal government. *Martin* v. *Malhoyt*, No. 86-5561 (D.C. Cir. Sept. 29, 1987), slip op. 25-26; see also Pet. Br. 27-30.

availability of immunity must turn on what is necessary "to aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)). See Resp. Br. 5-6 n.2, 10. The parties differ only on the contours of the immunity doctrine necessary to accomplish the ends for which it was created.

Our position is that, at a minimum, the *Barr* immunity protects federal employees acting within the scope of their official duties whenever they perform discretionary acts—those acts concerning which federal law "fails to specify the precise action that the official must take in each instance" (*Davis* v. *Scherer*, 468 U.S. 183, 197 n.14 (1984)). In disputing our submission, respondents offer an alternative which is so limited in scope and so uncertain as to provide plainly inadequate protection for the performance of governmental functions. Respondents would first allow immunity only in situations in which a federal employee exercised discretion "involving planning or policy considerations," as opposed to "day-to-day operations" (Br. 3). Respondents further state that immunity should be limited to discretionary acts "worthy of being called 'governmental.' " Br. 15; see also *id.* at 11, 13-16. These vague standards find no support in either this Court's prior decisions or the general principles of official immunity doctrine.[2]

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[2] Respondents tax us with changing our position, asserting (Br. 4) that we have abandoned the contention that a federal employee is immune from personal liability under state law whenever his actions fall within the scope of his official duties. In our opening brief (at 12-13) we expressly reserved the contention that a federal employee is entitled to immunity for his official acts regardless of whether the employee's duties involve the exercise of discretion. Because petitioners' duties involved the exercise of discretion, however, we concluded that the Court need not consider that broader proposition in order to resolve this case. Petitioners are entitled to immunity under the well-settled principle that official immunity protects employees who exercise discretion because the threat of personal liability would otherwise

1. Contrary to respondents' assertion that our submission represents an alteration in the present scope of federal employees' immunity from state law liability (Br. 3-6), it is respondents' policy-and-planning/governmental discretion test—insofar as it can even be applied in any concrete way—that would effect a dramatic change in immunity protection.

This Court has *never* held that a federal employee who exercises some discretion may be denied immunity in an action under state law because the quantum or nature of the discretion was insufficient. See Pet. Br. 15-21. Indeed, the plurality in *Barr* v. *Matteo, supra,* strongly indicated that the degree of discretion exercised by a government employee was *not* the dispositive factor in determining whether immunity was warranted. The court of appeals in that case would have distinguished officers with " 'political functions' " from inferior officers and left the latter to the protection of a qualified immunity. See *Barr* v. *Matteo,* 244 F.2d 767, 768-769 (D.C. Cir. 1957), quoting

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skew the employee's conduct and thereby impede the effective functioning of the federal government (see Pet. Br. 21-23, 24-26).

At the same time, respondents imply that we have not really changed our position because providing protection for all conduct involving discretion will in fact immunize all actions by government officials (Br. 4). This is also wrong. We acknowledge that a large proportion of the federal workforce exercises discretion in performing their official duties and therefore would be covered by the immunity standard that we propose. But that is simply a consequence of the fact that "[t]he complexities and magnitude of modern governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions" (*Barr,* 360 U.S. at 573 (plurality opinion)). There remain some federal employees who perform duties that are wholly ministerial; for example, a clerk whose responsibility is to stamp a document with the date upon which it is filed. The conduct of these employees—while perhaps protected by immunity on other, related grounds (see Pet. Br. 13 n.10)—would not be covered by the immunity principle that we urge here.

*Colpoys* v. *Gates*, 118 F.2d 16, 17 (D.C. Cir. 1941). The plurality of this Court expressly rejected the court of appeals' narrow view of the immunity principle, holding that immunity could not "properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts." 360 U.S. at 572; see also *id.* at 573 (the functions of government do not "become less important simply because they are exercised by officers of lower rank in the executive hierarchy").

The *Barr* plurality supported its conclusion by noting (360 U.S. at 572 n.9) lower court decisions that extended the principle of absolute immunity to a prison psychiatrist (*Taylor* v. *Glotfelty*, 201 F.2d 51 (6th Cir. 1952)), a regional Veterans Administration supervisor (*De Busk* v. *Harvin*, 212 F.2d 143 (5th Cir. 1954)) and the chief of a Veterans Administration hospital dietetic service (*Carson* v. *Behlen*, 136 F. Supp. 222 (D.R.I. 1955))—persons who, though they exercise discretion, typically are not confronted with broad policy choices. Thus, *Barr* cannot fairly be read as restricting immunity to employees who exercise a particular quantum of discretion. See also *Barr*, 360 U.S. at 587 n.4 (Brennan, J., dissenting) (observing that "[t]he [plurality's] rationale covers the entire federal bureaucracy").[3]

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[3] Respondents proffer a different interpretation of *Barr* (see Br. 6-7), but the passage of the opinion upon which they rely does not limit immunity to policymakers; it simply indicates that the scope of an employee's official duties is defined partly by reference to the extent of the discretion the employee exercises. See Pet. Br. 18-20; see also *Martin* v. *Malhoyt*, slip op. 6 (Williams, J., concurring in part and dissenting in part).

Respondents' discussion of *Doe* v. *McMillan*, 412 U.S. 306 (1973), is similarly flawed. We noted in our opening brief (at 20-21 n.14) that *Doe* concerned the immunity accorded to federal employees operating under the auspices of Congress. The only issue relating to *Barr* was whether these employees, who the Court had found to be entitled to

Moreover, the courts of appeals do not currently apply the narrow interpretation of *Barr* advanced by respondents. Three courts of appeals have concluded that

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derivative legislative immunity, also were protected by a second type of immunity by virtue of their status as federal employees. Since the question here is whether federal employees exercising only executive authority are protected by immunity, *Doe* is simply inapplicable. Respondents quote (Br. 7) a portion of the *Doe* Court's statement that "[i]n the *Barr* case [360 U.S. at 573], the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes." 412 U.S. at 319. The cited portion of *Barr* relates to precisely the point referenced above – that scope of authority is defined in part by the extent of a particular official's discretionary power. It thus appears that *Doe*'s reference to differences in the availability of immunity simply refers to variations in the scope of various officials' authority.

Indeed, in the constitutional tort context, the Court has rejected the approach of varying the applicable immunity standard from official to official or case to case. It has instead applied the qualified immunity standard announced in *Harlow* v. *Fitzgerald, supra,* to claims against virtually all government officials. Thus, in rejecting an argument that policy considerations required a different immunity rule where a plaintiff seeks damages for violations of the Fourth Amendment, the Court recently observed that "[a]n immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson* v. *Creighton,* No. 85-1520 (June 25, 1987), slip op. 7; see also *Malley* v. *Briggs,* 475 U.S. 335 (1986). That conclusion is equally applicable to claims against federal employees arising under state tort law. See *Martin* v. *Malhoyt,* slip op. 8-9 (Williams, J., concurring in part and dissenting in part).

Respondents also claim that the Court's decision in *Doe* rested upon a distinction between policymaking discretion and operational discretion (see Br. 8-9). However, as respondents themselves acknowledge (Br. 8), the Court concluded in *Doe* that the Superintendent of Documents and the Public Printer had *no* discretion with respect to the conduct that formed the basis of the claims against those officials. Accordingly, to the extent *Doe* is relevant at all (see Pet. Br. 20-21 n.14), it relates only to the situation in which a federal employee seeks immunity for wholly ministerial acts.

immunity protects all federal employees, regardless of whether their duties require the exercise of discretion. See *General Electric Co.* v. *United States,* 813 F.2d 1273, 1276-1277 (4th Cir. 1987), petition for cert. pending, No. 86-2015; *Cross* v. *Fiscus,* No. 87-1548 (7th Cir. Sept. 25, 1987), slip op. 4-5; *Poolman* v. *Nelson,* 802 F.2d 304, 307 (8th Cir. 1986). Others, while imposing some requirement of discretionary action, have not drawn a distinction between policymakers and other federal employees (Pet. Br. 11). As we discuss in our opening brief (at 31-32), these courts have extended immunity to low level federal employees—such as law enforcement officers, personnel supervisors, and others—whose duties are much closer to the day-to-day execution of preestablished policy than to the formulation of broad policy objectives.

This is hardly surprising in view of this Court's conclusion in *Davis* v. *Scherer,* 468 U.S. 183, 196-197 n.14 (1984), that qualified immunity from liability for constitutional violations is available to all government employees who exercise discretion, a conclusion that applies with equal force to the state tort law context. See Pet. Br. 21-22; *Martin* v. *Malhoyt,* slip op. 6-7 (Williams, J., concurring in part and dissenting in part). Respondents simply ignore *Davis,* failing even to cite the case in their brief. Moreover, respondents likewise present no principled justification for the result that would flow from their new immunity standard: a lower level federal employee could invoke qualified immunity in an action alleging a constitutional violation, but would have no protection at all in an action seeking damages for the very same conduct under state law.[4]

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[4] We demonstrate in our opening brief (at 42-46) that *Barr*'s absolute immunity rule is the appropriate analog in the state law context to the qualified immunity standard applicable in actions seeking damages for constitutional violations.

In sum, the immunity standard for which we contend is consistent with this Court's decisions and the rule applied by most of the courts of appeals. It is respondents who are the parties seeking to use this case to work a sea change in immunity doctrine: what they urge is nothing less than a wholesale reduction in the immunity that currently protects federal employees from personal liability under state law.

2. The consequence of respondents' standard would be a serious disruption of governmental operations, since immunity would apparently be unavailable in the great majority of cases where employees must make judgment calls. The plurality in *Barr* was concerned that the threat of liability for official acts "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571; see also *Anderson* v. *Creighton,* No. 85-1520 (June 25, 1987), slip op. 3 ("permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"). Respondents suggest (Br. 14) that these policies are relevant only when government employees exercise broad discretion. But whenever an official must use his own judgment in executing official duties, even if that judgment relates to the application of settled policy to the facts of a particular case, the course of action that the official selects could be influenced by the possibility of personal liability.

Whether a law enforcement officer at the scene of a crime, a federal personnel supervisor responsible for hiring, firing and promotion, or a caseworker evaluating an applicant's eligibility for a federal benefit program, federal employees frequently must make choices. And those choices often pit the interests of the federal government—fearless enforcement of criminal law, personnel

standards, or benefit criteria—against the interests of an individual who would be affected adversely by the government action. In the absence of immunity, the government employee would understandably perform his duties with an eye toward the possibility of suit by disgruntled citizens affected by his official conduct. The easiest way to avoid such harassment would be to shade decisionmaking in favor of the private party. Immunity is necessary to protect federal employees from this influence so that they may vigorously perform their federal duties. See also Pet. Br. 24-26.[5]

Indeed, we submit that it would be both unwise and unfair to single out lower ranking federal employees for this burden. Unwise because government policy cannot be put into effect without the efforts of lower level employees who perform the tasks that translate a policy determination into government action. See *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) ("causal step[s]" in effectuating policy decisions protected under discretionary function exception to liability under the Federal Tort Claims Act). Failure to insulate these employees from the chilling effect of potential personal liability would undermine the functioning of government as surely as subjecting high policymakers to such liability. Respondents' standard is unfair because it burdens the employees who are likely to be the least able to absorb an adverse monetary judgment, have the least control over their duties, and are charged only with carrying out decisions made by others.

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[5] Respondents themselves appear to recognize this fact. They acknowledge (Br. 12-13) that the immunity from liability accorded to federal employees must be broader than the government's immunity under the discretionary function exception contained in the Federal Tort Claims Act (see 28 U.S.C. 2680(a)). The difficulty is that the standard proposed by respondents, which they derive in part from cases interpreting that exception (see Resp. Br. 11), does not provide the broad protection that even respondents agree is appropriate.

Compelling these individuals to pay for damage caused by the activities of the federal government is a result that finds no support in the policies underlying the immunity doctrine.

3. An additional serious flaw in respondents' proposed immunity standard is its uncertainty of application. Immunity will fulfill its function of effectively insulating government employees from the chilling effect of the threat of personal liability only if those employees can reasonably anticipate, at the time that they execute their duties, whether their conduct will be shielded by immunity. See Pet. Br. 36-37. Just last Term, in *Anderson* v. *Creighton, supra*, the Court invoked this principle in refusing to create a special rule reducing the immunity accorded law enforcement officers in actions seeking damages under the Fourth Amendment. The Court observed that such a rule "would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." Slip op. 7; see also *id.* at 4, 10; *Davis* v. *Scherer*, 468 U.S. at 195-196.

Respondents' standard similarly provides no "assurance of protection." Because the availability of immunity in each case would depend upon a difficult ad hoc balancing of interests (see Resp. Br. 14), a federal employee could never know in advance whether he would be protected by immunity. See Pet. Br. 31-34. As a result, the employee could not perform his official duties free of the chilling effect of possible personal liability. Even relatively high-ranking government employees could not discount the possibility that a court viewing the situation in hindsight would conclude that the balance of policies weighed against immunity in a particular case. And the fact that immunity might later be accorded to the federal employee would not suffice to "aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)). Because the employee could have no reasonable certainty

of his immunity at the time he performed his official duties, he most likely would be influenced by the threat of monetary liability.

4. Respondents simply ignore two other considerations relevant in defining the scope of *Barr's* immunity principle. First, immunity is important in preventing state interference with the operation of the federal government. As we discuss in our opening brief (at 27-30), subjecting a federal employee to personal liability under state law for his discretionary official acts would give the employee a strong incentive to exercise his federal authority in a manner prescribed by the relevant state tort standards. An immunity rule that protects all employees who exercise discretionary authority will prevent such state interference with federal activities. See generally *Martin* v. *Malhoyt*, slip op. 25-26.[6]

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[6] Respondents suggest (Br. 14-15) that some federal activities are not "governmental" and therefore do not merit the protection of immunity. Respondents presumably have the present case in mind, but we can think of little that is more "governmental" than the standards governing the operation of a federal military facility. Military interests may require that chemicals and other materiel be stored according to standards different from those prevalent in civilian facilities. But subjecting employees such as petitioners to liability under state tort law would have the effect of forcing the federal government to adhere to state standards: an employee cannot be expected to comply with a federal directive when his actions might result in personal liability under state law. This problem is compounded by varying state law standards. With respect to the handling of dangerous substances, for example, there are substantial differences among the States. Several States, apparently including Alabama, impose a duty of ordinary care (see, *e.g.*, *Aretz* v. *United States*, 503 F. Supp. 260, 289 (S.D. Ga. 1977), aff'd, 604 F.2d 417 (1979), reaff'd, 660 F.2d 531 (5th Cir. 1981); *Pure Oil Co.* v. *Cooper*, 248 Ala. 58, 63, 26 So. 2d 249, 252 (1946)), while others impose a duty of extraordinary care (see, *e.g.*, *Miller* v. *Lambert*, 380 So. 2d 695, 698 (La. Ct. App. 1980); *Holt* v. *Dep't of Food & Agriculture*, 171 Cal. App. 3d 427, 436, 218 Cal. Rptr. 1, 6 (Cal. Ct. App. 1985)) and yet other States impose a standard of care that varies with the risk of danger (see, *e.g.*, *Custom Craft Tile, Inc.* v. *Engineered Lubricants Co.*, 664 S.W.2d 556, 558 (Mo. Ct. App. 1983)).

Second, the immunity standard for which we contend will not deprive injured persons of all opportunities for compensation. As we discuss in our opening brief (at 40-42), relief may be available under the Federal Employees' Compensation Act or the Federal Tort Claims Act. The existence of these alternate remedies, which respondents completely ignore, undercuts respondents' argument that a narrowly defined immunity standard is necessary to ensure that injured parties will obtain relief.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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